United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

No. 14,086

FILED FEB 18 1958

WINNEBAGO TELEVISION CORPORATION,
Petitioner,

v.

937

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

RADIO WISCONSIN, INC.,
GREATER ROCKFORD TELEVISION, INC.,
Intervenors.

PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

JAMES A. McKENNA, JR.
VERNON L. WILKINSON
McKenna & Wilkinson
1735 DeSales Street, N.W.
Washington 6, D. C.
Counsel for Petitioner

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PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

1. Whether the Commission's refusal to deintermix Madison and/or Rockford contravened Sections 303(g) and 307(b) of the Communications Act and deprived petitioner of statutory and constitutional rights.

2. Whether the Commission, particularly in the light of the results reached in other related proceedings where deintermixture was considered, was arbitrary and capricious in selecting and weighing the factors which it did in the Madison-Rockford deintermixture proceeding.

3. Whether the Commission's refusal to deintermix Madison contravened policy pronouncements in Docket No. 11532 and if so whether such action constituted reversible error.

4. Whether the Commission erroneously failed to give appropriate consideration to petitioner's proposals for minimizing or eliminating any signal in Madison from a Channel 3 allocation in Rockford.

5. Whether the Commission in refusing to deintermix Madison erroneously placed the "private interest" of a person who relied on the Sixth Report above the "interest of the public" in an efficient competitive nationwide television service.

6. Whether the Commission considered all relevant matter presented, whether the evidence supports the findings made, and whether the findings in turn warrant the conclusions reached.

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UNITED STATES COURT OF APPEALS

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Intervenors.

PETITION FOR REVIEW OF ORDERS
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BRIEF FOR PETITIONER

OPINIONS BELOW

The Commission's Report and Order of February 26, released March 1, 1957, wherein it refused to deintermix the Madison, Wis. - Rockford, Ill. area, is reported in 22 FCC Reports 356, 15 RR 1563 (R. 792-802). The Commission's subsequent Memorandum Opinion and Order adopted June 20, released June 24, and corrected June 26, 1957, wherein the Commission denied a petition for reconsideration of the aforesaid action, is reported in 23 FCC Reports 53, 15 RR 1572 (R. 864-873). An antecedent Report and Order of June 26, 1956 which occasioned the instant proceeding to make Madison all-UHF and Rockford either all-UHF or all-VHF is reported in 13 RR 1571 (see R. 1).

JURISDICTIONAL STATEMENT

This is a petition for review by Winnebago Television Corporation, licensee of Station WTVO, operating on UHF Channel 39 in Rockford, Illinois,

of the Commission's refusal to deintermix the Madison-Rockford area (R. 792-802; 864-873). The petition for review was filed August 19, 1957 pursuant to Section 402(a) of the Communications Act of 1934 as amended (47 U.S.C. Sec. 402(a)), Sections 2, 3, and 4 of the Judicial Review Act of 1950 (5 U.S.C. Sec. 1032, 1033, and 1034), and Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009). Venue is in the District of Columbia Circuit by virtue of Section 3 of the Judicial Review Act of 1950 (5 U.S.C. Sec. 1033).

STATEMENT OF THE CASE

The following background facts are pertinent to an understanding of Winnebago Television Corporation's petition for review of the Commission's refusal (by a 4-3 vote) to modify its 1952 television allocations in the Madison-Rockford area so as to make Madison all-UHF and Rockford either all-VHF or all-UHF.

In its spectrum allocation report of May 1945, the Commission made it clear that the 13 channels in the VHF band (later reduced to 12), which it there set aside for commercial television purposes, would not provide a nationwide competitive television service -- signal coverage and local origination. A substantial portion of the UHF band was accordingly reserved for experimental television purposes.[1] With these additional channels the Commission expected ultimately to achieve its basic objective of a nationwide competitive television service, and thus discharge statutory responsibilities imposed by Sections 303(g) and 307(b) of the Communications Act (47 U.S.C. Secs. 303(g) and 307(b)).[2]

Throughout the proceeding which culminated in the Sixth Report (1948-1952), the goal of a nationwide competitive television service was uppermost in the Commission deliberations and decisions.[3] In that Report, released April 14, 1952, the Commission reiterated its views, still currently sound,[4]

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1 Report in FCC Docket No. 6651, FCC Mimeo. 82387, May 25, 1945 (see 1 RR Pt. III, pp. 91:97-98).

2 See Sixth Report of April 14, 1952, 1 RR Pt. III, p. 91:604 (para. 13).

3 "If we cannot devise plans for 'a truly nation-wide, competitive system' of television for the next generation, we are not worth out salt." Chairman Coy, Address before Institute of Radio Engineers, FCC Mimeo. 19719, March 23, 1948. See Fourth Report of July 12, 1951, 1 RR Pt. III, pp. 91:556-448; see Sixth Report of April 14, 1952, 1 RR Pt. III, p. 91:664 (para. 197).

4 "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone are not adequate to make possible sufficient outlets for a fully competitive television system." Report and Order, released June 26, 1956 in Docket No. 11532 (13 RR 1571, para. 12).

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3, 13, 27, 33, 39 Winnebago — 7 Rockford — 13

that the 12 VHF channels are insufficient to provide an adequate television structure (particularly in the more populous portions of the United States).[1] The Commission accordingly added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels (Channels 2 through 13) theretofore set aside for television broadcast use.[2] The Commission also decided in its Sixth Report, that the UHF and VHF channels should be "intermixed" and utilized in the same major markets (para. 200); on the theory that such an allocation system would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course "an integral part of a single, nationwide television service" (para. 197).[3]

Pursuant to the intermixture policy thus utilized in its Sixth Report, the Commission on April 14, 1952 allocated a VHF channel and a UHF channel to Rockford, Illinois for commercial use (VHF Channel 13 and UHF Channel 39). In like fashion, the Commission allocated one VHF and two UHF channels to Madison, Wisconsin for commercial use (VHF Channel 3 and UHF Channels 27 and 33).[4] Madison is some 50 miles northwest of Rockford. At the time of the Sixth Report there were no television stations operating in either of these cities. Both received at best a fringe service from the low-powered prefreeze VHF stations in Chicago and Milwaukee. With relatively few VHF-only receivers in the area, there was every reason to believe that UHF operations would prosper in this area.

Petitioner, Winnebago Television Corporation, applied for and obtained a prompt grant on UHF Channel 39 in Rockford (Station WTVO). It has provided a UHF service to the Rockford area since April 29, 1953. Intervenor Greater Rockford Television, Inc. similarly applied for and obtained a prompt grant on VHF Channel 13 in Rockford (Station WREX-TV). It has provided a VHF service to the Rockford area since September 18, 1953. Early

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1 See Sixth Report of April 14, 1952, 1 RR Pt. III, p. 91:664 (para. 197).

2 See Sixth Report of April 14, 1952, 1 RR Pt. III, pp. 91:606-607 (para. 22).

3 Sixth Report of April 14, 1952, 1 RR Pt. III, pp. 91:661-665. As we shall see, this feature of the Sixth Report was subsequently repudiated by the Commission in its Report and Order of June 26, 1956 in Docket No. 11532, 13 RR 1571.

4 In its Sixth Report the Commission also allocated UHF Channel 45* to Rockford and UHF Channel 21* to Madison for noncommercial use.

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grants were similarly made on each of the three UHF channels allocated to Madison (Station WHA-TV on UHF Channel 21*, Station WKOW-TV on UHF Channel 27, and Station WMTV on UHF Channel 33).[1] Fortunately for the growth of UHF in this area, a grant of Channel 3 in Madison was delayed by the need for an Ashbacker hearing on two applications for that facility.

With Channel 3 not granted in Madison and with only one strong VHF signal serving the area (WREX-TV on Channel 13), the development of effective UHF operations in Rockford and Madison looked promising. However, long prior to the resolution of the comparative hearing for Channel 3 in December 1955 (10 RR 1224), it was becoming apparent to large segments of the television industry (with many markets still being flooded with VHF-only receivers) that the Commission's 1952 policy of intermixing UHF and VHF in the same area was a mistake -- that UHF stations in the larger markets were folding upon the advent of a second VHF service and in the smaller markets on the advent of a first VHF service. It seemed apparent that if the United States was not to be limited to television on 12 rather than the 82 channels envisaged by the Sixth Report, a change in allocation concepts was necessary. It was urged that the removal of ungranted VHF channels from markets where UHF stations were providing competitive service and the utilization of such channels in other areas already so predominantly VHF that UHF stations could not obtain a foothold would result in substantially more competitive service throughout the United States and a more effective utilization of valuable spectrum space.

In line therewith, on August 30, 1954, Station WKOW-TV requested the Commission to amend its Table of Television Assignments (Rule 3.606) by shifting the noncommercial educational reservation in Madison from UHF Channel 21* to VHF Channel 3, thus deintermixing Madison (Case No. 13,038, R.1-9). The two Channel 3 applicants (including Radio Wisconsin, Inc., an intervenor herein) opposed that request (Case No. 13,038, R.10-21).[2] On November 1, 1954 the Commission issued a Memorandum Opinion

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1 Station WKOW-TV began operation June 30, 1953; Station WMTV on July 8, 1953, and Station WHA-TV on March 26, 1954.

2 Ironically enough, immediately following the issuance of the Sixth Report in April 1952, Radio Wisconsin, Inc., had made an identical proposal which the Commission rejected because of its then prevailing intermixture concepts. Radio Wisconsin, Inc., 8 RR 823 (1952).

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and Order denying WKOW-TV's deintermixture request, largely because of hearing expenditures which the Channel 3 applicants had incurred in prosecuting their applications for that facility in reliance on the Sixth Report (Case No. 13,038, R. 22-24).

As a result of subsequent studies released by various committees of Congress, strongly intimating that "private considerations" of this nature should not be allowed to outweigh the "public interest,"[1] WKOW-TV on February 16, 1955 renewed its request to deintermix Madison (Case No. 13,038, R. 25-27). Oppositions thereto were again filed by the two Channel 3 applicants (Case No. 13,038, R. 28-38).

On March 29, 1955 Winnebago filed a petition (counterproposal) to amend the Table of Assignments (Rule 3.606) so as to eliminate intermixture in both the Rockford and Madison areas (Case No. 13,083, R. 39-63). As subsequently amended, Winnebago requested that Channel 3 be deleted from Madison, replacing it with Channel 39 (which would be available for the successful VHF Channel 3 applicant) and that Channel 3 be allocated to Orangeville, Illinois, for use by WTVO in Rockford (Case No. 13,083, R. 70-78). Channel 3 at Orangeville would provide a city-grade service to both Rockford and Beloit.[2] In this way, Madison would become an all-UHF market (with four UHF stations) and Rockford-Beloit would become an all-VHF market (with two equally competitive VHF stations).

As a result of these and similar pleadings in other markets, the Commission on March 31, 1955 reconsidered its earlier actions and instituted five "pilot" rule-making proceedings looking toward the deintermixture of various television markets (Hartford, Peoria, Evansville, Madison, and later Albany-Schenectady-Troy). The Commission decided, pending resolution of these proceedings, not to complicate the picture by making additional VHF grants in areas which were predominantly UHF.[3]

After receiving voluminous written data and hearing oral argument thereon, the Commission in three related actions of November 10, 1955

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1 See the so-called Plotkin and Jones Reports of February 1 and 12, 1955 (R. 472-475).

2 Beloit is part of the Rockford Trade Area, as defined by Hagstrom. The cities are approximately 15 miles apart and have many common interests. At least one radio station (WBEL, Beloit) has studios in both cities.

3 See Commission Brief in Case No. 13,034 et seq. (Coastal Bend Television Co. v. Federal Communications Commission), p. 10.

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concluded that the concept of intermixture had been "basic" to the Sixth Report, and that the "pilot" deintermixture proceedings and petitions then pending to deintermix 30 other markets should be denied as premature, until a general rule-making proceeding ordered that same day, in which it proposed to take an over-all look at its Sixth Report, had been completed (Docket No. 11532).[1] However, a majority of the Commission decided at this juncture not to postpone action in VHF comparative proceedings pending its re-examination of the Sixth Report in Docket No. 11532 (11 RR 1511, 1518, para. 11).[2]

Fearing that an intervening grant of Channel 3 in Madison would preclude its subsequent shift (after Docket No. 11532 was decided) to the Rockford-Beloit area, Winnebago filed a petition on November 21, 1955 to intervene in the Channel 3 proceeding and, in the alternative, asked that Channel 3 not be granted until Docket No. 11532 was decided, and if granted that it be on condition that no construction be begun until Docket No. 11532 was concluded (Case No. 13, 038, R. 1240-1275). That petition and similar relief sought by the two UHF commercial stations in Madison (Case No. 13, 038, R. 1229-1239) were denied by the Commission in a Memorandum Opinion and Order released December 12, 1955 (Case No. 13, 038, R. 1299-1307). Concurrently therewith, by decision released the same date, the Commission granted Channel 3 in Madison to Radio Wisconsin, Inc. (10 RR 1224), on the premise that at a later date in Docket No. 11532 it could, if it were there found desirable, shift an existing VHF operation to UHF just as readily as if the grant had not been made (13 RR 1511, 1516).[3]

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1 See Report and Order of November 10, 1955, 13 RR 1511, 1517 (para. 8); Memorandum Opinion and Order of November 10, 1955, 13 RR 1522, 1525 (para. 5); Notice of Proposed Rule Making, November 10, 1955 in Docket No. 11532, 20 Fed. Reg. 8501 (1955).

2 It was this facet of the November 10, 1955 Orders - refusal by the Commission to hold VHF comparative proceedings in abeyance while it was restudying its Sixth Report -- which gave rise to the first round of deintermixture appeals. Coastal Bend Television Co. v. F. C. C., 97 U.S. App. D.C. 339, 231 F. 2d 339 (1956); ibid, 98 U.S. App. D.C. 251, 234 F. 2d 686 (1956); Greylock Broadcasting Co. v. United States, 97 U.S. App. D.C. 414, 231 F. 2d 748 (1956); Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F. 2d 727 (1956); Gerico Investment Co. v. United States, 99 U.S. App. D.C. 379,240 F. 2d 410 (1957).

3 For example the Commission there said: "In our opinion, if deintermixture, even on a partial basis, should finally be determined to be a useful method of resolving the overall problems, the particular communities for its applications should not be selected merely because of the fortuitous circumstance of whether a VHF station has commenced operation in any particular community." Report and Order of November 10, 1955, para. 6 (13 RR 1511, 1516).

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The two UHF stations in Madison, and a number of UHF operators similarly affected by the Commission's actions of November 10 and by subsequent VHF grants made prior to definitive action by the Commission on "deintermixture," sought relief in this Court (Case No. 13, 034, 13, 035, 13, 038, 13, 039, 13, 057, 13, 058). Winnebago intervened in the Madison cases (Nos. 13, 038 and 13, 039),[1] contending that a majority of the Commission, in deciding to make additional VHF grants in UHF areas while taking a new look at intermixture concepts embodied in its Sixth Report, had done so on the legally and factually erroneous premise that such a grant would in no way impede the Commission from deintermixing a particular market in the event it subsequently decided on a different policy in Docket No. 11532. In an opinion, released June 7, 1956, this Court refused to disturb the Commission's decision to "adhere" to its 1952 intermixture concepts and to make additional VHF grants in conformity with its 1952 allocation table, pending the outcome of the proceeding in Docket No. 11532. Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956).

While the foregoing questions were being litigated in this Court, the Commission was studying the various comments which had been filed in Docket No. 11532. It was daily becoming more apparent (as contested VHF stations went on the air and more UHF stations went off the air) that the intermixture of UHF and VHF channels in the same markets was resulting in less service rather than more service (R. 434-447). In areas with little or no VHF competition UHF was doing a satisfactory job but in the larger markets with the advent of a second VHF operation (and in the smaller markets with the advent of a first VHF station) the UHF operations were folding or incurring deficits which could not be borne indefinitely.

It is not surprising, therefore, that the Commission in its June 26, 1956 Report in Docket No. 11532 (13 RR 1571) concluded, at long last, that

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1 On December 7, 1955 Winnebago had sought reconsideration by the Commission of its actions of November 10, 1955. The Commission had completely ignored that pleading in its Orders of December 12, 1955 granting Channel 3 to Radio Wisconsin, Inc. With that pleading not yet disposed of, petitioner was unable to join in the appeals taken by the two UHF stations in Madison. Southland Industries v. Federal Communications Commission, 69 U.S. App. D.C. 82, 99 F. 2d 117 (1938). In an effort to protect its interests and prevent its deintermixture proposal from becoming "moot" by said grant, Winnebago took the unusual action of intervening in this Court on the side of the appellants (Case Nos. 13,038, 13,039).

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intermixture was not producing an integrated television system, that VHF in some instances was thwarting opportunities for effective competition among a greater number of stations, and, in the words of this Court, "that the intermixture of UHF and VHF channels was, on a nationwide basis, a failure." Jacksonville Journal Co. v. Federal Communications Commission, 101 U.S. App. D.C. , 246 F.2d 699, 700, 15 RR 2045, 2046 (1957). Pending a further study of the advisability of ultimately moving all television into the UHF band (thus eliminating the intermixture problem), the Commission concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among a greater number of stations." Although recognizing that a decision in each market must turn on its individual facts, the Commission laid down detailed ground rules for such determinations (13 RR 1571, 1582).[1]

Accordingly on June 26, 1956 (concurrently with the release of its Report in Docket No. 11532), the Commission instituted some 13 rule-making proceedings to deintermix areas where it appeared that the deletion or shift of a VHF channel would "improve the opportunities for effective competition among a greater number of stations."[2] Among the proceedings thus

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1 These were "In markets with one or more commercial VHF assignments, the merits of proposals to eliminate a VHF commercial assignment would depend to a large extent on such factors as:

1. Whether significant numbers of people would lack service as a result of the elimination of the VHF channel.
2. Whether one or more UHF stations are operating in the area.
3. Whether a reasonably high proportion of the sets in use can receive UHF signals.
4. Whether the terrain is reasonably favorable for UHF coverage.
5. Whether, taking into acount all of the local circumstances, the elimination of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

The desirability of assigning a first VHF channel or of adding an additional VHF channel would depend principally upon:

1. Whether it is possible to locate the new transmitter so as to meet minimum transmitter spacings.
2. Whether, in cases where it is necessary to move the channel from another city, there is greater need for the channel in the area to which it is proposed to be assigned.
3. Whether the addition of a new VHF assignment would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

2 Curiously enough, in its June 26, 1956 Report, the Commission also decided in those areas where it had reinstituted deintermixture proceedings -- and contrary to the policy which it had been following since November 10, 1955 -- to condition any subsequent VHF grants in such markets on the outcome of the deintermixture proceeding and subject to the further proviso that no construction be begun until the deintermixture proceeding in that market was resolved. So far as Madison was concerned, this was an attempt to lock the barn door after the horse was stolen, inasmuch as Radio Wisconsin, Inc. (WISC-TV) had gone on the air on Channel 3 two days previously (June 24, 1956).

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instituted was one (Docket No. 11754) to deintermix Madison by reserving Channel 3 for educational use and substituting a UHF channel therefor (R. 1-2).

In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's action in Docket No. 11532 and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted with a view to deintermixing particular markets (R. 520-526).

On August 27, 1956 Winnebago submitted an alternative proposal in Docket No. 11754 -- that both Madison and Rockford be deintermixed by shifting Channel 3 from Madison to the Rockford area and substituting UHF Channel 39 therefor, thus assuring Madison of three equally competitive UHF commercial facilities (one for each of the national networks, with an additional educational station likewise operating as at present on UHF) and two equally competitive VHF stations in Rockford (R. 69-77). On October 22, 1956, the Commission announced that it would give consideration in Docket No. 11754 to Winnebago's counterproposal (R. 106-107).

In subsequently filed comments the proposal to deintermix Madison and/or Rockford was supported by the three UHF commercial stations in Rockford and Madison, by the Joint Council on Educational Television, and by American Broadcasting-Paramount Theatres, Inc. (ABC), a network which has been handicapped by its inability to obtain outlets comparable to those enjoyed by NBC and CBS in a number of important markets. The only oppositions to the Commission's rule-making proposal and Winnebago's counterproposal came from Radio Wisconsin, Inc., the grantee of Channel 3 and from a group denominating themselves Wisconsin Committee to Save Existing Rural Television Service.

In its opening comments of December 3, 1956 (R. 386-526), Winnebago supported (1) the Commission's proposal to preclude the use of Channel 3 "for commercial purposes" in Madison, (2) its own counterproposal to assign Channel 3 to Rockford and substitute Channel 39 therefor in Madison, and (3) an alternative proposal that Rockford be deintermixed by deleting Channel 13 and substituting a UHF channel therefor (R. 388).

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Winnebago submitted voluminous data showing that such shifts would not result in any substantial "white area." By engineering affidavit it was brought out, using existing powers and antenna heights and the Commission's own Standards for computing Grade B contours for VHF stations and actual measurements for the coverage of UHF stations in Madison, that an area of only 684 square miles with a population of 11,644 persons is presently served by Station WISC-TV on Channel 3 in Madison which is not within the existing Grade B contours of other stations, and that the utilization of Channel 3 in Rockford would provide a Grade B service to an area of 96 square miles with a population of 3,999 persons who are not within the existing Grade B contours of other stations (R. 405-406, 415). It was further shown, using existing powers, that WISC-TV provides a Grade C or fringe signal (Grade B minus 6 db) to an area of only 348 square miles with a population of 5,503 persons who are not within the existing Grade C contours of other stations (R. 406, 416). It was further shown that this so-called "white area" (some 50 miles to the north and west of Madison) does in fact receive acceptable television service, as disclosed by the large number of sets in use in the area prior to the time WISC-TV commenced operating on Channel 3 (R. 394, 420-429). It was accordingly urged that the shift of Channel 3 from Madison to Rockford would not result in any substantial "white area" and that it was a small price indeed to pay for three equally competitive assured services in Madison.

Winnebago likewise submitted voluminous data (engineering, economic, and program) demonstrating the need for a second VHF channel in Rockford: It was there shown that, except for the city of Rockford itself, substantial portions of the area served by Winnebago are predominantly VHF in character -- to the northeast by reason of three VHF stations in Milwaukee, to the southeast by reason of three VHF stations in Chicago, to the southwest by reason of two VHF stations in Rockford-Davenport-Moline, and to the northwest by WISC-TV in Madison, which (if the channel remained there) would blanket all of Winnebago's service area to the northwest including the city of Rockford (R. 395-414). It was further pointed out that by reason of these multiple VHF signals, and the shortage of all-channel receivers in outlying areas,

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that Winnebago's card rates are necessarily substantially below those of its VHF competitor in Rockford (WREX-TV on Channel 13) (R. 396-397), that Station WTVO operates at a distinct competitive disadvantage audiencewise (R. 397, 430-433), and that Winnebago's continued operation on UHF (with WISC-TV placing a Grade B signal over Rockford) was highly problematical (R. 639-649). It was accordingly urged, in order to assure Rockford of a second competitive service, that VHF Channel 3 should be allocated to the Rockford area. It was further pointed out that the shift of UHF Channel 39 (which Winnebago had been using in Rockford) to Madison (for use by Radio Wisconsin, Inc.) would mean a ready-made audience for WISC-TV by reason of the large number of sets between Rockford and Madison equipped to pick up Channel 39 (R. 398).

In its answering comments of December 28, 1956, Radio Wisconsin, Inc. made much of the fact that if Channel 3 were shifted to the Rockford area (Orangeville)[1] it would still provide a strong Grade B (and might even be so located as to provide a Grade A signal) into Madison -- thereby arguing that Madison would not be "deintermixed" (R. 567-568).

Since the Commission's June 26, 1956 "rule-making" notice had provided only for opening and answering comments and precluded "further comments" except for "good cause" (R. 1, para. 3), Winnebago filed three pleadings on February 25, 1957: (1) "Petition for Leave to File Additional Comments" (R. 769-772), (2) "Additional Comments of Winnebago Television Corporation" (R. 774-791), and (3) "Petition for an Order to Show Cause" (cf. R. 776).[2]

In these pleadings Winnebago pointed out that if Station WCIA on Channel 3 in Champaign, Illinois shifted its transmitter site to the south, Channel 3 could be utilized south and west of Rockford (at a distance of 60 to 70 miles from Madison), from whence it would place little or no signal in Madison but nevertheless provide a city-grade service to Rockford. Winnebago offered to pay the expenses of such a move by Station WCIA. It was further pointed out that such a shift in WCIA's transmitter location would

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1 In order to meet mileage separation requirements (transmitter to transmitter) it was necessary, in the event Channel 3 was shifted from Madison to Rockford, to place the transmitter in the vicinity of Orangeville, Wisconsin -- from which location the requisite city-grade signal could be placed over Rockford (R. 413).

2 This document, directed against Midwest Television, Inc., Station WCIA, Channel 3, Champaign, Illinois, is not included in the record certified to this Court. It is adequately summarized for present purposes at R. 776.

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improve the UHF picture in Peoria, Illinois and Bloomington, Indiana (R. 776) and that a shift of Channel 3 from Madison to Rockford would compensate the state of Illinois for the loss of a VHF channel it would suffer in the contemplated move of Channel 2 from Springfield, Ill. to St. Louis, Mo. (R. 777-778). It was further pointed out that if Channel 3 were used in the Orangeville area its signal could be suppressed in the direction toward Madison by directional means and concentrated toward Rockford, thereby obviating any intermixture problem in Madison (R. 776, 787-790).

By Report and Order adopted February 26 and released March 1, 1957, the Commission (by a 4-3 vote) refused to modify its 1952 allocations in the Rockford-Madison area (R. 792-802). Although rejecting Winnebago's pleadings of February 25 as untimely (R. 798, para. 16), it nevertheless placed much stress on the fact that if Channel 3 were shifted to Rockford it would continue to infiltrate the Madison area from Orangeville (R. 797, para. 13).

In a Petition for Reconsideration filed April 1, 1957 Winnebago highlighted the inconsistencies, referred to by the dissenting Commissioners (R. 799-802), between the Commission's action in Madison and its actions deintermixing Peoria, Springfield, Evansville, Fresno, Elmira, and Schenectady (R. 816-830). It re-emphasized the "public interest" aspects of its February 25 pleadings which the Commission had rejected as untimely (R. 816-830). By Memorandum Opinion and Order released June 24 (corrected June 26, 1957) the Commission denied the aforesaid Petition for Reconsideration (R. 864-873). These actions of the Commission are the subject matter of the instant Petition for Review duly filed in this Court on August 19, 1957 (Case No. 14, 086). Radio Wisconsin, Inc., licensee of Station WISC-TV on Channel 3 in Madison, and Greater Rockford Television, Inc., licensee of Station WREX-TV on Channel 13 in Rockford, have intervened herein.

STATUTES AND RULES INVOLVED

Pertinent constitutional and statutory provisions are set forth in the Appendix to the instant brief.

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STATEMENT OF POINTS

1. The Commission's refusal to deintermix Madison and/or Rockford (either by reserving Channel 3 in Madison for noncommercial use, by shifting Channel 3 to Rockford, by delimiting the transmitter location and operation of Channel 3 if it were shifted to Rockford, by eliminating Channel 3 and not assigning it elsewhere, and/or by making Rockford all-UHF) contravened Sections 303(g) and 307(b) of the Communications Act.

2. The Commission, particularly in the light of results reached in other related proceedings where deintermixture was ordered,was arbitrary and capricious in selecting and weighing the factors which it did in the Madison deintermixture proceeding and thereby deprived petitioner of statutory and constitutional rights.

3. The manner in which the Commission refused to deintermix Madison and/or Rockford contravened policy pronouncements in Docket No. 11532 and deprived petitioner of statutory and constitutional rights.

4. The Commission erroneously failed to give appropriate consideration to petitioner's proposal to delimit the utilization of Channel 3 if utilized in Rockford, its alternative proposal to make Rockford all-UHF, and otherwise placed the "private interest" of WISC-TV above the "interest of the public" in an efficient, competitive nationwide television system.

5. The Commission failed to consider all relevant matters presented, as required by Section 4(b) of the APA, made findings not supported by the evidence, failed to make findings warranted by the evidence and reached conclusions not rationally flowing from the finding which it made and from the evidence of record.

6. The Commission's actions are arbitrary, capricious, illegal, a denial of due process of law, not supported by the evidence of record, otherwise contrary to law, and in derogation of the public interest.[1]

SUMMARY OF ARGUMENT

What constitutes due process, even in so-called adjudicatory proceedings, varies with the issues involved. In some situations due process includes the rights to confrontation, the right of cross-examination, the right to specific findings on evidence of record, and the right to rational conclusions

1 The foregoing Statement of Points is presented as a summary (and is not intended to supplant) the more detailed Grounds upon Which Review is Sought specified in the Petition for Review.

predicated on such findings. In other situations, even in so-called adjudicatory proceedings, it may include none of these. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 46 175 F. 2d 351 (1949). United States v. Storer Broadcasting Company, 351 U.S. 192, 205 (1956); Federal Communications Commission, v. Station WJR, 337 U.S. 265 (1949); Jay v. Boyd, 351 U.S. 345 (1956).

Just as the type of hearing required by the Fifth Amendment in so-called adjudicatory proceedings may vary with the issues and circumstances, so it may vary in so-called rule-making or legislative proceedings. The mere fact that an administrative agency elects to handle a problem by "rule making" rather than by "adjudication" or chooses to label the proceeding "rule making" rather than "adjudicatory" is not decisive. Philadelphia Co. v. Securities and Exchange Comn., 84 U.S. App. D.C. 73, 175 F.2d 808 (1948), dismissed as moot, 337 U.S. 901 (1949); National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 248, 132 F.2d 545 (1942), aff'd 319 U.S. 239 (1943).

Where the impact of the Commission's action is "particular and immediate" rather than "general and future", due process requires that disputed adjudicative facts (i.e., facts pertaining to a particular party or particular situation) not be found without a hearing, with an attendant right to present evidence, to demand findings predicated on such evidence, and to insist on rational conclusions flowing from such evidence. Philadelphia Co. v. Securities and Exchange Comn., supra; National Broadcasting Co. v. Federal Communications Commission, supra; Morgan v. United States, 298 U.S. 468, 480 (1936); Londoner v. Denver, 210 U.S. 373 (1908). Where agency action "necessarily affects existing rights . . . whether by one form of action or the other, the ordinary distinction between quasi-legislative and quasi-judicial action gives way before the elementary requirement that rights be not destroyed or impaired without a hearing." National Broadcasting Co. v. Federal Communications Commission, supra. Thus we get nowhere by labeling a proceeding as "rule making" or "adjudicatory". Where the impact of the agency action is particular and immediate, adjudicative facts must be determined in either type of proceeding by the quasi-judicial

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method. National Broadcasting Co. v. Federal Communications Commission, supra; Philadelphia Co. v. Securities and Exchange Comn., supra.

The proceeding to deintermix Madison called for an ascertainment by the Commission of adjudicative facts. General principles for correcting the consequences of the 1952 mistaken policy of intermixture, where feasible, by eliminating a VHF channel in a UHF area were delineated by the Commission in its Report and Order of June 26, 1956, following a general rule-making proceeding in Docket No. 11532 (13 RR 1571). There the Commission concluded that intermixture had proved a failure, that the policy of intermixing UHF and VHF in the same markets was no longer a sine qua non to the allocation table, and that deintermixture should be utilized (as an interim measure) to improve opportunities for more effective competition among a greater number of stations in areas which met certain tests there laid down (five criteria). By their very nature these individual proceedings to deintermix specific markets, though labeled "rule making", called for the ascertainment of adjudicative facts -- the effect of a VHF operation in Madison on existing UHF licensees presently serving the Madison-Rockford area. The impact of any decision thus reached on existing licensees was "particular and immediate" rather than "general and future."

Petitioner is a licensee of the Commission -- it is not a mere applicant. It has limited property rights in the facilities by which it is providing a UHF service to the Rockford area. L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948).

As a result of the proceeding in Docket No. 11532, the Commission has recognized at long last that UHF stations cannot survive in areas with multiple VHF operations. 22 FCC Reports 293, 302 (para. 19); cf. Commission's brief, in Case No. 13,768, p. 26; see also 15 RR 1682, 1688. The Madison-Rockford area has two VHF operations (Channel 3 in Madison and Channel 13 in Rockford). The utilization of Channel 3 in Madison, since it will mean fewer UHF receivers in that area, will reduce petitioner's coverage in and around Rockford just as completely and just as detrimentally as a grant which would create electronic interference. Federal Communications Commission v. National Broadcasting Company, 319 U.S. 239 (1943); Federal Communications Commission v. Sanders Bros. Radio

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Station, 309 U.S. 470 (1940); Metropolitan Television Co. v. United States, 95 U.S. App. D.C. 326, 221 F.2d 879 (1955). Because of the direct impact which the retention of Channel 3 will have on existing UHF services in the Madison-Rockford area, petitioner was entitled to a due process determination whether the use of Channel 3 in Madison would serve the public interest.

In not demanding an oral (as distinguished from a written) hearing in Docket No. 11754, petitioner did not waive other due process safeguards -- its right to rebut (by written data) facts developed by other parties to the proceeding, its right to findings predicated on pertinent evidence thus submitted, and its right to conclusions based onsuch findings. See National Broadcasting Co. v. F.C.C., supra; Philadelphia Co. v. Securities and Exchange Comm., supra; Johnston Broadcasting Co. v. FCC, supra.

The impact which the retention of Channel 3 in Madison would have on UHF stations (present and potential) was completely ignored by the Commission in making its threshold determination whether Madison or Rockford was more in need of coverage which a Channel 3 operation might provide (R. 792-798). In determining which community had greater need for that channel, the Commission considered the problem as though the Report in Docket No. 11532 had never been issued. It gave no consideration to the problem whether the public in Wisconsin and Illinois would have more service if Channel 3 were deleted altogether, or if it were reserved for noncommercial educational use, or if the transmitter site for such an operation was restricted to an area south of Rockford (R. 797-798). The Commission's "approach" and "reasoning" in the Madison proceeding, when contrasted with that used in the six other proceedings decided the same day where deintermixture was ordered, is shockingly apparent.

Even in rule-making proceedings which are "general and future" in their effect, an administrative agency is required by Section 4(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1003(b)) to articulate its reasons for the result it reaches in such a way that a reviewing court can determine whether the result was or was not reached "after consideration of all relevant matter presented" and in line with basic concepts laid down by

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Congress in the statute under which the Commission functions. See Schaffer Transportation Company v. United States, 26 Law Week 4039. In the Report and Order here challenged (R. 792-798) and in the subsequent Order denying the petition for reconsideration (R. 864-873), several alternative uses for Channel 3 were completely ignored. Under such circumstances it is impossible for a reviewing court to ascertain whether the action here challenged was reached "after consideration of all relevent matter presented."

ARGUMENT

I. The Commission's Conclusions Do Not Rationally Flow From Its Basic Findings And Its Findings In Turn Do Not Adequately Reflect The Evidence Of Record.

As heretofore noted in our Statement of the Case, on June 26, 1956 (concurrently with its conclusion in Docket No. 11532 that intermixture was a "failure"),the Commission instituted separate rule-making proceedings in 13 markets where it appeared that the deletion of a VHF channel in predominantly UHF areas would "improve the opportunities for effective competion among a greater number of stations." On March 1, 1957 the Commission released its Reports and Orders in eight of those proceedings, including Madison-Rockford.[1] Except in the Madison and Hartford proceedings the Commission concluded that the public interest would be served by deleting the VHF channel. If one contrasts the Commission's "reasoning" and "approach" in the six proceedings where it elected to deintermix given markets with that used in the Madison-Rockford case, the arbitrary nature of the result reached in the instant proceeding becomes shockingly apparent -- as we now propose to demonstrate.

A. "White Area." -- Needless to say, in determining whether a VHF channel should be deleted from a predominantly UHF area, the fact whether such action would deprive a significant or substantial number of persons of their only existing or potential television service is an important public interest consideration. A "white area" criterion was accordingly specified

1 Albany-Schenectady-Troy-Vail Mills (Docket No. 11751), 22 FCC Reports 293; Elmira, N.Y. (Docket No. 11758), 22 FCC Reports 307; Springfield, Ill. - St. Louis, Mo. (Docket No. 11747), 22 FCC Reports 318; Hartford, Conn. - Providence, R. I. (Docket No. 11748) 22 FCC Reports 332; Peoria-Rock Island-Davenport-Moline (Docket No. 11749) 22 FCC Reports 342; Madison, Wis. - Rockford, Ill. (Docket No. 11754), 22 FCC Reports 356; Fresno-Santa Barbara, Cal. (Docket No. 11759), 22 FCC Reports 365; and Evansville, Ind. - Louisville, Ky. (Docket No. 11757) 22 FCC Reports 382.

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in Docket No. 11532. However, bearing in mind the wider propagation characteristics of a VHF signal, the mere fact that its deletion would create some "white area" was not to be decisive. Otherwise the 13 proceedings which the Commission instituted on June 26, 1956 were pointless. It was only where the deletion of the VHF channel would result in a substantial or significant number of persons losing their only service that the "white area" consideration was to assume controlling importance.[1]

As might be expected, in each of the eight proceedings decided March 1, 1957, the opponents of deintermixture, by one method or another and using various assumptions, asserted that the deletion of the VHF channel in question would result in a varying amount of so-called "white area" (i.e., area receiving no other television service). Likewise, in each of these proceedings the advocates of deintermixture minimized the extent of any such "white area" in various ways: (1) By coverage computations based on the Commission' s own engineering Standards and curves; (2) by measurements; (3) by receiver-set figures and listening surveys showing that people in these so-called "white areas" do in fact receive "service" from other television stations (UHF or VHF); (4) by pointing out that with the elimination of the danger of being "smothered" by the VHF operation, existing UHF stations could afford to make additional capital investments and thus increase their coverage through more power and antenna height and by satellites and boosters; and (5) with the area becoming predominantly UHF, other allocated but ungranted UHF channels would be utilized -- thus eliminating so-called "white area". In each of the six proceedings where the Commission concluded that the public interest would be served by eliminating the VHF channel, the Commission in resolving the "white area" problem heeded one or more

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1 A number of factors inevitably enter into a proper determination of the "public interest." If television channels were interspersed in a checkerboard fashion throughout the United States, and if it could be assumed that each such allocation would be utilized, every person in the United States would be assured of at least one television service. But such an allocation patem, without regard for population centers, in a country where television is supported by the advertising dollar rather than by government appropriations, is not economically feasible. Furthermore, because of the potency of television in moulding public opinion, single monopoly operations presenting only one viewpoint are highly dangerous. Finally, with the growth and development of television dependent in large part on the existence of strong competitive networks, multiple stations are a "must" in the major and secondary markets of the United States. For these reasons, multiple services in population centers are frequently a factor no less important than the "first service" concept in determining what action will best serve the "public interest."

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(generally several) of the foregoing arguments of the advocates of deintermixture and utilized the data submitted in support of such contentions. But in the instant case it belittled or ignored such countervailing considerations.

For example, the opponents of deintermixture in Albany claimed a "white area" of 120,700 persons (22 FCC Reports 299, para. 14); in Elmira a "white area" of 30,681 persons (22 FCC Reports 311, para. 13); in Springfield a "white area" of 12,243 persons (22 FCC Reports 322, para. 12); in Peoria a "white area" of 28,237 persons (22 FCC Reports 346, para. 17); in Madison a "white area" of 102,159 on the basis of disputed UHF measurements (22 FCC Reports 360, para. 9), and of 45,869 persons on the basis of the Commission's computation methods (R. 160); in Fresno a "white area" of "thousands" of people in the Sierra Nevada Mountains (22 FCC Reports 370, para. 16); in Evansville a "white area" of 28,928 persons (22 FCC Reports 386, para. 13). In each of these markets except Madison the Commission nevertheless ordered deintermixture. Like the advocates of deintermixture in the six markets where deintermixture was ordered, petitioner submitted countervailing data. Using the Commission's own Standards and curves for VHF coverage and measurements for the low-powered UHF operations, petitioner showed (through a duly qualified engineer) that the "white area" created by the deletion of Channel 3 from Madison would embrace only 11,644 persons, a figure which would be reduced to a net loss of 7,645 persons by the fact that Channel 3 in Rockford would provide a first service to 3,999 persons (22 FCC Reports 360, para. 10). Petitioner further showed that this so-called "white area" already receives service from other stations, as evidenced by receiver and listening surveys made before WISC-TV went on the air (R. 420-429). One of the proponents of UHF in Madison (WKOW-TV) further showed that by increasing power and installing satellite operations (which it promised to do if Channel 3 was deleted from Madison), any such "white area" would be entirely eliminated (R. 796, para. 11). What did the Commission do with the conflicting data thus submitted?

In Peoria, a market which the Commission decided to deintermix, it seized upon the fact that the conditional VHF grantee would probably operate on UHF if Channel 8 were deleted, that such UHF operation would eliminate

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some of the "white area," and that if existing UHF stations increased their power to 1000 kilowatts and 1000 feet there would be little "white area" left, "based on the prediction method set out in the Rules" (22 FCC Reports 347, para. 16). And it further concluded that "it was likely that the Springfield UHF station will improve their facilities and provide service to the 'white area' south of Peoria" (22 FCC Reports 348, para. 17). In short, even in the absence of flat commitments in Peoria, the Commission assumed that the UHF stations would increase their coverage if the VHF channel was deleted, thereby minimizing any "white area" problem.

In Madison, on the other hand, although noting in its "findings" that WKOW-TV (in the event Channel 3 was deleted) had promised to increase its power and antenna height so that it "would have greater coverage than WISC-TV as presently operating on Channel 3, thus eliminating any 'white area' resulting from the deletion of Channel 3" and "will build satellite stations in Dubuque, Iowa and Portage, Wisconsin", plus "such translator stations as may be necessary to replace any lost service not otherwise regained" (22 FCC Reports 360-361, para. 11), the Commission totally ignored such considerations in its ultimate conclusion that the "deletion of Channel 3 from Madison would result in 'white area' contrary to the public interest" (22 FCC Reports 362, para. 14). While recognizing elsewhere that "potential service" from new or improved facilities on UHF resulting from the deletion of a VHF channel, and that the existence of other "service" in so-called "white area"(on UHF and VHF) even before Channel 3 went on the air in Madison (as reflected by receiver-set and audience surveys) "are by no means immaterial in allocation matters" (R. 796, para. 11), the Commission nowhere considered these factors in determining the extent of any "white area" which would be occasioned by deleting Channel 3 in Madison (irrespective of its use elsewhere). In short, unlike Peoria where the Commission assumed (and rightly so) that low-powered UHF stations, as soon as the lethal threat of VHF competition was eliminated, would make additional capital investments, augment antenna height and power, and thereby eliminate any significant "white area", the Commission allowed WISC-TV's absurd figure of 102,159, based on existing UHF powers

and predicated on measurements taken at a height of 10 feet,[1] to stand (R. 795-796, paras. 9-10).

Because Channel 3 in Rockford would not (under WISC-TV's computation methods) provide a first service to as many people as in Madison, the commission deemed it unnecessary to ascertain the precise consequences (white-area-wise) of its deletion from Madison (R. 796, para. 11). But this "approach" only serves to highlight still further the arbitrary nature of the Commission's action. Under principles laid down in Docket No. 11532, the deletion of a VHF channel in a given market was not dependent on its utilization elsewhere. If it could be utilized elsewhere, so much the better. But if its deletion in a given market would improve the opportunities for effective competition among a greater number of stations in that market, such deletion was to be ordered even though the deleted VHF channel was not reassigned elsewhere. In fact, in both Elmira and in Albany-Schenectady-Troy-Vail Mills, the Commission placed the deleted VHF channel "on ice" for that very reason. 22 FCC Reports 307; 22 FCC Reports 293. Hence, whether Channel 3 could or could not be used in Rockford or elsewhere was no excuse for concluding whether it should or should not remain in Madison. In deciding whether it should remain in Madison, the Commission was required to make a determination on the extent, if any, of the "white area" which would be occasioned by its deletion. Here, no such conclusion was reached, primarily on the "excuse" that its utilization in Orangeville would not effectively deintermix Madison (R. 797, para. 13). But such an "excuse", whatever be its merits for not assigning Channel 3 to Rockford, was no reason (in view of the Elmira and Vail Mills precedents) for not reserving Channel 3 in Madison for educational purposes, or for not deleting Channel 3 from Madison altogether.

Even if the utilization of Channel 3 in Rockford were relevant to the question whether it should continue to be assigned in Madison, once again the Commission's "reasoning" was specious in the light of its action in other proceedings. Here, confronted with estimates of "white area" varying from

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1 In the only other proceeding decided March 1, 1957 in which the Commission refused to delete a VHF channel from a UHF area (Hartford) and in which the VHF grantee similarly relied on UHF measurements taken at 10 feet and interpolated to the 30 feet specified by the Commission's standards, the Commission discounted such disparaging measurements of UHF coverage -- "field intensity measurements at the normal height of rooftop antennas /30 feet instead of 10 feet/ would show a much more favorable propagation of UHF signals" (22 FCC Reports 336, para. 8). It should have similarly discounted WISC-TV's measurements for the same identical reason.

11, 644 to 102, 159 if Channel 3 were deleted from Madison, the Commission argued that its utilization in Rockford would cover a white area of only 3, 999 persons, and ergo Madison needed Channel 3 worse than did Rockford (R. 797, para. 14). Under a parity of reasoning, the Commission in the Springfield case could have said that Channel 2 in Springfield would obviate a "white area" of 12, 243, whereas its utilization in St. Louis would provide a white area service to only 3, 000 persons, and ergo that Channel 3 should remain in Springfield and not be utilized to provide a fifth VHF service in St. Louis (22 FCC Reports, 322, para. 12). Such reasoning was not used in the Springfield case, first because the Commission wanted to deintermix that market, and second because it would be pure sophistry in the light of basic findings made in Docket No. 11532.

And this brings us to the fundamental fallacy in the Commission's "approach" to the "white area" problem in the instant proceeding. Although (as heretofore shown) the comparative needs of Madison and Rockford for a VHF channel was only tangentially germane to the question whether Channel 3 should remain in Madison (in view of its effect on multiple UHF operations in that market), the Commission proceeded to evaluate those needs just as though it was deciding the problem under the "intermixture" concept of 1952, and completely ignored new allocation policies enunciated in Docket No. 11532 after five years of sad experience with UHF and VHF assignments in the same markets. In other words, in deciding whether the utilization of Channel 3 in Rockford would better serve the public interest than its utilization in Madison, the Commission blinded itself to the fact that Rockford already had a VHF channel, that most of the outlying area covered by a Rockford station is predominantly VHF, and that unless a second VHF channel were placed in Rockford that market might well be left with a monopoly operation on Channel 13, whereas substantially more of the area around Madison is already UHF, and (with the deletion of Channel 3) that market would have three equally competitive commercial stations on UHF. In Springfield and the other markets which it deintermixed, the Commission gave full weight to conclusions reached in Docket No. 11532 in comparing relative needs of those markets for a VHF station, but in the instant proceeding it approached the problem in precisely the same fashion as it would

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have in 1952 -- completely ignoring vital information learned in the intervening five-year period concerning the consequences of intermixture.

The Commission's "approach" to the "white area" problem in Madison, resulting from the deletion of Channel 3, was arbitrary on still another score. In the Peoria and Springfield cases the Commission placed great emphasis on the fact that the VHF service in those areas existed only "on paper," inasmuch as the VHF "conditional" grantees were not yet on the air. 22 FCC Reports 322, para. 11; 22 FCC Reports 346, para. 14. In the Peoria case the Commission called particular attention to the fact that the VHF station was not yet on the air and hence that no one would lose an "existing service" (22 FCC Reports 346, para. 14, emphasis by the Commission). As brought out in our Statement of the Case, in its November 10, 1955 Orders and in its subsequent briefs in this Court, the Commission solemnly assured the affected UHF licensees and this Court that an intervening VHF grant in Madison, while Docket No. 11532 was being resolved, would not be utilized as a reason for not subsequently deintermixing that market. Notwithstanding these solemn commitments the Commission had the audacity to consider WISC-TV's existing coverage (pursuant to a grant made while Docket No. 11532 was under consideration) and to attempt to distinguish the result it here reached from that in Springfield-St. Louis by pointing out, "that, since Channel 2 at Springfield has never gone on the air at Springfield, no person will suffer a loss of service previously received, that the loss of potential [as distinguished from an existing] service is relatively insignificant" (R. 797, fn. 5).

In a further effort to buttress its "white area" conclusions in the Madison case, the Commission makes reference to what it describes as the "rough and broken terrain" north of Madison (22 FCC Reports 359, para. 7). It could not deny that the terrain on three sides of Madison was ideally suited to UHF. In Elmira, in Fresno, and in the Albany-Schenectady-Vail Mills-Berkshire Mountain area of western Massachusetts, where the terrain is certainly far more "rough and broken" and where the Commission "elected" to "deintermix," terrain was no barrier (and rightly so) to such a conclusion.

In short, data submitted by Radio Wisconsin, Inc. laying stress on alleged "white area" were no more substantial and no more convincing than

the evidence submitted by the opponents of deintermixture in the Albany-Schenectady-Troy-Vail Mills, Elmira, Springfield-St. Louis, Peoria, Fresno-Santa Barbara, and Evansville-Louisville proceedings -- where the Commission none the less ordered deintermixture. Had it used the same "approach" and "reasoning" in Madison as it used in those cases it could and would have come to the same conclusions that " no significant numbers of people would lack service as a result of the elimination of the VHF channel from Madison."

As Commissioner Bartley pointed out in his dissent (R.801), "To the extent that de-intermixture in Madison may, according to certain computations, show the creation of 'white areas' (which as the majority recognizes '. . . is largely a matter of judgment in which individuals may reasonably differ'), appropriate weight should be given, as in some of the other de-intermixture cases, to the stated proposals of the existing UHF stations to improve their facilities through the use of increased height, power, satellites, translators, etc. to offset such loss of service as may occur." In other areas deintermixed March 1, 1957, appropriate weight was given to such data. Here it was not, through the guise of diverting attention to what "white area" would be picked up <u>if</u> Channel 3 were utilized in Rockford, a consideration which had no direct bearing on whether Channel 3 should be <u>deleted</u> from Madison, i.e, placed "on ice" or reserved there for educational purposes.

B. <u>UHF Area.</u> -- As a result of the general rule-making proceeding in Docket No. 11532, the Commission laid down as one of the criteria, in determining whether deintermixture should be ordered, "whether one or more UHF stations are operating in the area." Quite obviously, in an area with no UHF stations there was no point in eliminating a VHF. That criterion was therefore eminently sound.

Not even the Commission could deny that UHF stations are operating in the Madison-Rockford area (to wit, three such stations in Madison and one in Rockford). Except for the VHF station granted while Docket No. 11532 was pending, there was no Grade A VHF service in Madison. Prior to the advent of that station and against a single VHF operation in Rockford, petitioner was providing a commendable program service on UHF. In the

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Madison-Rockford proceeding the Commission placed much stress on the fact that "outside" VHF stations provided some service to portions of the service areas of the UHF operations in Madison and Rockford (though not to the cities of Madison and Rockford themselves). This was done to "play down" the UHF character (all-channel receivers) of the Madison area and to buttress the Commission's assertion that the deletion of Channel 3 from Madison would not really deintermix the Madison area.

That this tongue-in-cheek approach was disingenuous is borne out by the fact that in each of the six areas where deintermixture was ordered, in reports released simultaneously with the Madison decision, the record disclosed a not dissimilar penetration of the UHF service areas by outside VHF stations.[1] For example, the Springfield UHF area received service from VHF stations in Champaign and St. Louis and potentially from Channel 8 in Peoria; the Peoria area in turn received VHF service from two stations in Davenport-Rock Island and from Champaign. The Fresno area received service from VHF stations in Bakersfield, Stockton, and San Francisco; the Albany-Schenectady-Troy area received VHF service from New York City and Utica; the Elmira area received VHF service from Utica and Albany. In short, as the Commission full well knew, complete deintermixture was nowhere feasible. The whole thrust of the conclusions reached in Docket No. 11532 was to keep to a minimum the number of strong VHF signals in areas which were predominantly UHF.

In this connection, it is significant to note that the Commission used the signal of Station WREX-TV in Rockford (because of its penetration into the Madison area) as an excuse for not deintermixing Madison. It likewise used as a reason for not shifting Channel 3 to Rockford the fact that Channel 3 in Orangeville would also throw a strong VHF signal into Madison.[2] But

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1 As Commissioner Bartley pointed out, "In Madison, as in some of the other areas being de-intermixed, the existence of VHF signals coming from distant cities and separate markets, rendering only service to the fringe areas of the community and its surroundings, should not militate against the primary objectives of the proceeding, ..." (R. 801).

2 It should be noted in passing, in order to highlight the lengths which the Commission had to go in an effort to warrant the result here reached, that it made reference to the fact that if Channel 3 were shifted from Madison and utilized in the Orangeville area, it could move its transmitter to within 33 miles of Madison, thus placing almost a Grade A signal in that city. The Commission avoided mentioning that petitioner could not have placed its transmitter at such a location without first obtaining the Commission's consent therefor. In Peoria, where a similar argument was made regarding the placement of the tower toward Peoria if Channel 8 were shifted to Davenport, the Commission gave short shrift to such contentions by noting that "we will afford careful scrutiny to any applications for VHF channels in other cities which may appear to specify transmitter sites unnecessarily close to Peoria" (22 FCC Reports 349, para. 19). Here, the Commission had no compunction about seizing upon an argument which it squarely rejected in the Peoria case.

neither of these "reasons" was justification for turning down other alternative proposals which the Commission had before it. Those "reasons" did not warrant the Commission's refusal to reserve Channel 3 in Madison for non-commercial educational use, nor did they warrant a refusal to place Channel 3 "on ice" (as the Commission did in the Elmira and in the Albany-Schenectady-Vail Mills proceedings) and to substitute a UHF channel therefor. Nor did they justify the Commission's rejection on procedural grounds of proposals which it had before it to suppress the radiation of Channel 3 toward Madison (if used in Orangeville) or to require its relocation at a site 60 to 70 miles south of Madison as petitioner had proposed in its pleadings of February 25, 1957. Nor did these "reasons" warrant the Commission's failure to consider the possibility of deleting Channel 3 from Madison and at the same time deleting Channel 13 from Rockford, thereby making both cities exclusively UHF. Finally, such reasoning by the Commission ignored the recognized fact that UHF stations in moderately sized and larger markets have been able to provide a valuable service on UHF against one strong VHF signal from an outside market (and sometimes even in the same market, as in the Rockford case), but such UHF operations have been in jeopardy the moment two strong VHF signals are placed over the city which the UHF station primarily serves.

C. UHF Set Saturation. -- The Commission properly recognized in its June 26, 1956 Report that one of the basic deterrents to the growth of UHF is the absence of all-channel receivers. Accordingly, the Commision restricted its individual deintermixture proceedings to areas where it appeared that there was a high proportion of sets in use capable of picking up UHF signals. In the Madison case the Commission was forced to recognize that substantially 100% of the sets in both Madison and Rockford were capable of receiving UHF signals, and that nothing but all-channel receivers were being sold in those markets.[1]

The record in the Madison-Rockford case, like the records in the six proceedings where the Commission did order deintermixture, showed that the percentage of all-channel receivers decreased as one moved away from

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1 As Commissioner Bartley pointed out, "Madison, as well as the other areas being 'de-intermixed', has virtually 100% local and area conversion of receivers for UHF reception" (R. 800).

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the UHF centers toward the peripheries of such UHF operations where outside VHF signals were being received. As we read the decision in the instant proceeding, the Commission made no effort to justify the different result reached in Madison from the result reached in the other six proceedings on any theory of inadequate all-channel receiver set saturation.

In this connection, the Commission did not consider undisputed data submitted by petitioner that the all-channel character of receivers in the area around Rockford decreased much more rapidly than in the area around Madison, in view of Rockford's closer proximity to several large metropolitan markets - being ringed by VHF stations in Milwaukee, Chicago, Rock Island-Moline-Davenport, and by Madison (if Channel 3 remains in that market). For these reasons, petitioner urged the allocation of a second VHF to Rockford was necessary in order to insure a second competitive service in that market; that an increase of power by the Rockford UHF station would merely place a wasted signal over area flooded with VHF-only receivers and hence not improve its competitive position vis-a-vis Channel 13. On the other hand, an increase of power by the UHF stations in Madison would place a stronger and more dependable signal in an area where all-channel receivers are being utilized.

D. Terrain. -- In its general rule-making proceeding (Docket No. 11532) the Commission properly recognized that terrain was a factor which had to be considered in determining whether a given market should be deintermixed to all-UHF. In its decision in the instant proceeding, the Commission apparently recognized that the area to the east, south, and west of Madison presented no great obstacle to a successful operation on UHF. It did refer to the rough and broken terrain some 40-50 miles north of Madison as possible "white area." The Commission did not assert and could not assert that the terrain in the lake region of Wisconsin was as rough and broken as the Berkshire Mountain area of western Massachusetts or as the Elmira-Albany-Schenectady-Troy-Vail Mills area of upstate New York. In these last-mentioned areas it decided that UHF could do the job. Four years of experience with two commercial UHF operations in Madison showed that they too could do the job. Furthermore, WKOW-TV agreed, if Channel 3

were deleted as a commercial operation in Madison, to increase tower and antenna height and if need be to install satellite operations in areas which might otherwise have received a service from Channel 3. Thus, "terrain" was no "excuse" for not deintermixing Madison.[1]

E. Multiple Competitive Services. -- The ultimate purpose of the 13 proceedings which the Commission instituted concurrently with its Report and Order of June 26, 1956 in Docket No. 11532 was to determine whether the deletion or shift of a VHF channel would "improve the opportunities for effective competition among a greater number of stations." The Commission realized under its intermixed system of 1952 that the 12 VHF channels by themselves were inadequate to provide a nationwide, competitive television service, and that the 70 UHF channels were going to waste. It realized that a second VHF signal in the larger markets, and a first VHF signal in the smaller markets were rendering the UHF allocations to those areas useless, and that (with 82 channels to work with) the utilization of UHF channels only in areas which were predominantly UHF, and transferring to VHF-only areas the lone VHF channels originally allocated to UHF markets under the 1952 deintermixture concept, would result in more service in both areas. The various criteria spelled out in Docket No. 11532 were designed to produce data by which to resolve the controlling consideration -- would the deletion (or shift) of a VHF channel result in more stations or fewer stations.

As heretofore noted, in weighing the respective "needs" of Rockford and Madison, the Commission gave no consideration to the effect of the retention of Channel 3 in Madison on the UHF stations in either Madison or Rockford. That matter was resolved as though UHF and VHF could coexist side by side in the same market, as the Commission assumed (with some justification) that they would in 1952, but could not so assume in 1957 (after its general proceeding in Docket No. 11532). Having thus disposed of the "need" argument, looking solely at the question from the standpoint of the

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1 As pointed out by Commissioner Bartley, "In Madison, as in the otherareas being de-intermixed, the terrain is generally suitable to the reception of UHF transmission" (R. 801).

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location at which Channel 3 would provide a first service to the greatest number of persons, the Commission then took up as a "moreover" matter the fundamental consideration which occasioned the proceeding -- the effect of the "proposed shift" of Channel 3 on opportunities for more effective competition among a greater number of stations on the Madison-Rockford area. Here, the reasoning of the Commission borders on intellectual dishonesty (R. 797-798, para. 15).

First, the Commission states that Madison and Rockford are "separate television markets" -- a matter on which we quite agree. But if they are separate markets, why did the Commission in paragraphs 12 and 13 (in discussing penetration of signals from outside markets) place so much emphasis on the fact that WREX-TV on Channel 13 and petitioner on Channel 3 in Orangeville would place VHF signals into the so-called Madison area?[1] Why did it in the very next sentence in paragraph 15 (R. 797-798) assert that Channel 3 at the Orangeville site will "provide in the city of Madison what is tantamount to a Grade A signal?" Even that assertion completely ignored petitioner's proposal that an operation at Orangeville be required to suppress its signal toward Madison (by directionalizing -- a simple matter in TV as distinguished from AM) or by moving 60-70 miles south of Madison (from where it would place almost no signal into Madison). That assertion also completely ignored alternative proposals before the Commission: (1) to reserve Channel 3 for educational use in Madison; (2) to place Channel 3 "on ice" (as the Commission did in Elmira and Vail Mills in reports likewise issued on March 1, 1957); (c) to make Rockford all-UHF (by deleting Channel 13). Under none of these alternatives would Channel 3 have provided "what is tantamount to a Grade A signal" in Madison. Furthermore, at the precise location proposed by petitioner if Channel 3 were shifted to Orangeville, that station would only have placed a Grade B signal in Madison. This fact was significant because Springfield was deintermixed even though the Champaign station placed a Grade B VHF signal in that market; Peoria was intermixed even though the Davenport-Rock Island VHF stations placed

[1] The Commission knows that in separate markets of equivalent size, a VHF signal in one market from a station operating in the other market is less damaging to a UHF operation than a VHF operation in the same market. For example, although Baltimore and Washington are only 38 miles apart, being markets of equivalent size, the networks and national advertisers buy both markets and make no effort to cover Washington from Baltimore or vice versa, even though the Washington stations technically place a Grade B signal in Baltimore and vice versa.

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a Grade B signal in Peoria.

For the Commission to say, therefore, that Madison "would not be effectively deintermixed" was to ignore the other alternatives before it, and to make a statement no less true and no more true than could have been made in the other six markets which it did deintermix in reports likewise released March 1, 1957.

The Commission next speaks of Channel 3 in Orangeville as "straddling" two markets. This stems from its observation in paragraph 13 (R. 797) that Channel 3, if shifted to the Orangeville area, could be placed as close as 33 miles to Madison -- at which location it would almost place a Grade A signal into Madison (or to use the Commission's phraseology "what is tantamount to a Grade A signal"). But as petitioner pointed out, Channel 3 could also be used as much as 43 miles from Madison (from whence it would place only a Grade B signal in Madison while still meeting city-grade requirements over Rockford). Whether it would or would not "straddle" two markets was thus a matter entirely within the Commission's control.[1] Why didn't it say, as it did in Peoria, that it would scrutinize any subsequent application which proposed a site "unnecessarily close" to Madison?

Having thus demolished a "straw man," the Commission then comes up with a gem -- it sheds tears because Channel 3 at Orangeville would have greater coverage than WREX-TV presently has at Rockford on VHF Channel 13. WREX-TV, entrenched as the only VHF operation in Rockford, has operated over the years with a visual power of 45.7 kw rather than with the 316 kw which the Rules permit and which the Commission has encouraged. The Commission has favored maximum utilization of scarce VHF channels. If a Rockford station operating on Channel 3 went to the maximum power permitted (100 kw on Channel 3), the Commission has sufficient expertise to know that WREX-TV would immediately follow suit. But if this was done, so says the Commission, WREX-TV would then place a stronger signal in Madison. But this is a non sequitur. Before the Commission can grant an application

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1 It should be noted in passing that the Commission, as an expert body, should have known that many operations have attempted to "straddle" two markets of equivalent size, some 40-50 miles apart, to their great regret -- resulting in their not being fully accepted in either market. We emphasize markets of equivalent size, because national advertisers do sometimes attempt to cover a small market by a VHF operation in a major metropolitan center -- accepting such coverage as is thus obtained since they would not have "ordered" the smaller market separately.

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filed under Section 308, it must find under Section 309 that a grant will serve the public interest. The Commission could require WREX-TV to suppress its signal toward Madison from its present site (by directionalizing), or require it to select a site not "unnecessarily close" to Madison, as it proposed to do in Peoria. Here again, such arguments by the Commission ignores other alternatives which it had before it in Docket No. 11754 -- to make Rockford all-UHF.

After this series of non sequiturs and failing to face up to the issues, the Commission without any other discussion makes the startling assertion that "we see a far greater probability that at least five commercial stations will continue to operate in the Madison-Rockford area than would be the case if Channel 3 were shifted to Rockford" (R. 798, para. 15). This "conclusion" once again ignores other available alternatives -- the placing of Channel 3 "on ice" (as the Commission did in Elmira and Vail Mills), the reservation of Channel 3 in Madison for noncommercial educational use, or the making of Rockford all-UHF.

Furthermore, with the Commission itself recognizing that 100% of the sets in and around Madison and Rockford are equipped to pick up UHF, there can be no question since Rockford (before Channel 3 went on the air in Madison placing a strong Grade B signal over Rockford) was supporting a VHF and a UHF operation affiliated with CBS and NBC, it could likewise support two UHF stations. Whether it can continue to support a UHF and a VHF, with an additional VHF signal in Rockford from Channel 3 in Madison, is problematical. Thus, the retention of Channel 3 in Madison may well mean a single operation in Rockford (on VHF Channel 13). Similarly, if Madison can support two UHF commercial stations against a VHF (affiliated with CBS and taking the lion's share of national and regional spot business by virtue of its network programs and its wider coverage), there can be little question that Madison would support three UHF commercial operations. Thus, the deletion of Channel 3 from Madison, its reservation in Madison for educational use, or the deintermixing of Rockford by making it all-VHF or all-UHF would assure five commercial operations. The retention of Channel 3 in Madison could well spell one less station in Rockford and one less station in Madison.

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Nowhere in paragraph 15 does the Commission specifically take up the effect which Channel 3 in Madison will have on the two UHF operations in that market -- whether they will or will not survive. And for a very good reason. Madison, as the Commission notes, does not rank in the first 100 markets of the United States (R. 794, para. 6). WREX-TV places a Grade B VHF signal in Madison. WISC-TV, of course, places a city-grade signal over Madison on Channel 3. Three VHF stations in Milwaukee serve a portion of the area served by the Madison stations. These facts are significant because on the same day that it refused to deintermix Madison, the Commission proposed to make Albany-Schenectady-Troy all-UHF. Those three cities constitute the 30th market in the United States. On March 1, 1957, those cities had one VHF and two UHF operations (as did Madison). They had less VHF service from outside stations than does the Madison area. Yet, in the Albany proceeding, confronted with a similar situation, the Commission drew on its expertise and concluded as follows: ". . . our experience in other markets convinces us that the advent of a second VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of the existing UHF stations to continue to provide service to the area." The Commission accordingly proposed to delete a pre-World War II operation on Channel 6 and to place Channel 10 (Vail Mills) on ice. If two UHF's cannot survive against a single VHF station in a market much larger than Madison, it was the height of effrontery to find a "greater probability" that Rockford-Madison would continue to have five stations if Channel 3 was kept in Madison.

It is no answer to say that UHF has got off to a head start in Madison. That was true in many cities where experience has shown that the UHF stations folded on the advent of a second VHF operation in large markets and, on the advent of a first VHF station in the smaller markets. As the Commission's general counsel correctly stated in his brief in the Peoria case (Case Nos. 13, 768 et al), p. 26:

> "It seems clear that despite the head start of the [two] UHF stations in Peoria operation there by one VHF station proposed in 1952 is likely to seriously jeopardize the continued successful operations of one or both of the existing UHF

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> stations as well as any real possibility of the successful development of a fourth station." See also Channel Assignment to Columbia, S.C., 15 RR 1682, 1688 (1957).

In short, as succinctly stated by Commissioner (former Chairman) Hyde, concurred in by Commissioner Bartley, the action of the majority in the Madison case "is obviously inconsistent with action taken in similar cases of the same date (Elmira, Evansville, Fresno, Peoria, Springfield and Schenectady)" (R. 799-802). The action in Madison cannot be harmonized with that taken in those proceedings:

(a) It cannot be explained by a desire on the part of the majority of the Commission to retain the VHF channels in the states to which they were originally assigned by the Sixth Report, because in three cases -- Springfield, Peoria, and Evansville -- VHF channels allocated to one state by the Sixth Report were shifted to another state or states by the actions of March 1, 1957. 22 FCC Reports 318; 22 FCC Reports 342; 22 FCC Reports 382. In fact, in the Sixth Report the Commission had allocated to Illinois, with a substantially larger population than either Missouri or Wisconsin, fewer VHF channels than to either of those states (approximately at the ratio of 1:4). Having shifted on March 1, 1957 Channel 8 from Peoria to Davenport, Iowa,[1] and Channel 2 from Springfield to St. Louis, Mo., the Madison-Rockford proceeding afforded the Commission an excellent opportunity to rectify in some degree the deficiency in VHF allocations suffered by Illinois.

(b) It cannot be harmonized on any theory of not permitting scarce VHF channels to go unused, because in two instances, Channel 10 in Vail Mills and Channel 9 in Elmira, the VHF channel was placed "on ice" and not allocated elsewhere in order to foster the development of UHF facilities. 22 FCC Reports 293; 22 FCC Reports 307; cf. 15 RR 1682 (1957).

(c) It cannot be justified on any "white area" concept because Radio Wisconsin's evidence on this score was no more persuasive than comparable evidence adduced in the six proceedings where deintermixture was ordered. The fact that the UHF stations in Madison, with the elimination of the lethal threat of competition from Channel 3, would augment their power and provide

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[1] Technically, Channel 8 was allocated to Davenport-Rock Island-Moline. However, because of mileage separation requirements it was necessary that the transmitter be located in Iowa rather than Illinois.

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satellite service was ignored by the Commission in paragraph 14 of its conclusions (R. 797), as was the showing made by petitioner that so-called "white area" was in fact receiving service from other stations in Wisconsin even before Channel 3 got on the air (R. 420-429).

(d) It cannot be explained on terrain factors because in Elmira, Vail Mills, and the Berkshire Mountains of western Massachusetts, the terrain is recognizedly less favorable to UHF propagation than in the Madison area (22 FCC Reports 293; 22 FCC Reports 307).

(e) It cannot be rationalized on any theory that the area in question will not support an adequate number of UHF operations to provide competitive service, because (except for the Connecticut Valley) the Madison-Rockford area has more existing UHF operations than any other area involved in the various deintermixture proceedings decided March 1, 1957 (see R. 434-447).

(f) It cannot be explained on any dislocation concept because in Evansville, Fresno, and Schenectady the Commission proposed to shift existing VHF operations. 22 FCC Reports 382; 22 FCC Reports 365; 22 FCC Reports 293. In according WISC-TV "credit" for existing coverage, the Commission reneged on assurances given UHF operators in its November 10, 1955 Reports and Orders and subsequent assurances given this Court (in defending such actions) that VHF grants made while Docket No. 11532 was being resolved would not be used as an "excuse" for not deintermixing areas which were then exclusively UHF.

(g) It cannot be justified on the ground of penetration into the Madison area of VHF signals from outside stations, because in each of the markets which the Commission did deintermix a not dissimilar situation existed (for example, Champaign's penetration of Springfield, Bakersfield's penetration of Fresno, etc.). Furthermore, such an "excuse" ignored the Commission's authority to minimize such penetration by the Rockford stations (if that market was made all-VHF) by requiring them to directionalize or to deny transmitter locations "unnecessarily close" to Madison (in line with action promised in Peoria). It took no account of petitioner's alternative proposal that Rockford be made all-UHF, by deleting Channel 13 and substituting a UHF channel therefor.

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(h) It cannot be explained on the premise that the educational station in Madison was already operating on UHF and that the Wisconsin legislature had not appropriated funds to shift the operation to VHF. WHA-TV still preferred the VHF assignment (see R. 793) and did not object to shifting to Channel 3 if funds could be procured to cover the expense involved. In scores of cases the Commission has continued educational reservations where the legislatures have not yet appropriated the necessary funds. There is every reason to believe that the Ford Foundation or the commercial stations in the area would make a VHF transmitter available to the University of Wisconsin, as they have in other markets. In any event, such reasoning does not dispose of another alternative before the Commission of allowing WHA-TV to remain on Channel 21, of placing Channel 3 "on ice" and/or shifting Channel 39 to Rockford-Madison for WISC-TV.

The Madison decision thus defies all logic. It can only be explained on the basis of considerations not articulated in the decision. For reasons not disclosed by the record(and on which we have no intention of speculating), a majority of the Commission was determined to keep Channel 3 in Madison for use by Radio Wisconsin, Inc. It can scarcely be denied that if the instant proceeding were admittedly and recognizedly "adjudicatory" in character that the March 1, 1957 decision could not stand. "The progress to a valid conclusion, as long since established by the cases, is: to receive the evidence; then to make from the evidence findings of basic facts; then to make by inference from the basic facts, findings of the ultimate facts which are requisite to decision; then to write a final conclusion by the application of the statutory criteria to the ultimate facts." Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 46, 175 F. 2d 351 (1949); American Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 343, 350, 179 F. 2d 437 (1949). Here, the ultimate conclusion does not rationally flow from the ultimate findings; the ultimate findings are not supported by the basic findings; and the basic findings in turn do not reflect the evidence of record.

Can the Commission lay down ground rules in a general rule-making proceeding, as it properly did in its Report and Order of June 26, 1956 in Docket No. 11532, and then undertake to give effect to those general princi-

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ples by a proceeding relating to a specific channel in a specific market, and by calling the proceeding one for "rule making", resolve the matter by findings and conclusions not predicated on the record and not conforming to due process concepts enunciated by this Court in the Johnston case? No matter how arbitrary and capricious the result, is there no judicial review because the Commission purported to make the decision in question pursuant to procedures spelled out in Section 4 of the APA, dealing with general rule-making proceedings, future and prospective in their force and effect? To those legal questions we now address ourselves.

II

Where "Adjudicative Facts" Are in Dispute in an Administrative Proceeding (Be it "Rule Making" or "Adjudicatory"), Due Process Requires the Administrative Agency to Receive Evidence, to Make Basic Findings Thereon, and to Draw Rational Conclusions Therefrom

With the Commission resorting more and more to so-called "rule-making proceedings" rather than "adjudicatory proceedings" as a means of giving effect to the basic policies laid down by Congress in the statute under which the Commission functions, the instant petition for review calls for a determination by this Court of the "essential minima of procedural due process" in those situations where the impact of the Commission's actions on existing licensees is "particular and immediate," rather than "general and future". National Broadcasting Company, Inc. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 248, 132 F. 2d 545 (1942), aff'd 319 U.S. 239 (1943); Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 81, 175 F. 2d 808 (1948). The problem is one which has been broached in the legal periodicals;[1] but which has not been met head on by the courts. Simply stated the question is this: Where "adjudicative facts" (as hereinafter defined) are in dispute in an administrative proceeding (be it "rule making" or "adjudicatory" in character), does "due process" require the administrative agency to receive evidence, to make basic findings thereon, and to draw rational final conclusions therefrom?

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[1] See Professor Kenneth C. Davis, "Requirement of a Trial-Type Hearing", 70 Harvard Law Review 193-280 (1956).

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Where the proceeding is admittedly adjudicatory in nature, comparative or otherwise, the Communications Act itself (independently of the Fifth Amendment) calls for a "full hearing",[1] and such a hearing, as made clear by this Court, requires the Commission to receive evidence, to make basic findings thereon, and to draw rational conclusions therefrom. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 46, 175 F. 2d 351 (1949). Conversely, where the proceeding is "legislative" in character (i.e., "general and future in effect", and turning solely on "legislative facts"), Section 4 of the APA makes it equally clear (5 U.S.C. Sec. 1003) that an administrative agency, after giving "general notice" of proposed rule making, after affording interested persons an opportunity to submit written data, views, or arguments, and "after consideration of all relevant matter presented", may adopt new rules accompanied by a "concise general statement of their basis and purpose."

But as a recognized authority in the field of administrative law has convincingly demonstrated, we get nowhere by "labeling" an entire proceeding[2] as "adjudicatory" or as "rule making", and then asserting that a fair "adjudicatory hearing" requires confrontation, cross-examination, oral argument, basic findings and rational conclusions, whereas a "rule-making" proceeding merely requires an opportunity to present written comments with the administrative agency free to reach substantially any result it chooses. Such generalizations are too sweeping.

Due process, even in proceedings which are admittedly adjudicatory in character (e.g., "licensing"), does not always require that the applicant be afforded a "hearing." Notwithstanding the express language of Section 309(a) and 309(b) of the Communications Act (47 U.S.C. Sec. 309(a) and (b)), which seems to suggest that if the Commission is unable to find that a grant of an application will serve the public interest it must designate the application for hearing, the Commission can reject without a hearing an application which

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1 E.g., Sections 309(b), 309(c), 310(b), 325(c) (47 U.S.C. Secs. 309(b), 309(c), 310(b), 325(c)). Sections 303(f) and 316 (47 U.S.C. 303(f) and 316) use the term "public hearing".

2 "One obvious reason why whole proceedings /before an administrative board or agency/ cannot properly be labeled 'judicial' or 'legislative' is that in a single proceeding a tribunal comonly acts both judicially and legislatively. The process of resolving disputed facts about particular parties is the essence of the judicial process and calls for a trial-type hearing." Davis, op. cit., p. 202.

contravenes basic engineering standards or allocation tables (United States v. Storer Broadcasting Company, 351 U.S. 192, 205 (1956), and it may do so even without according the applicant a hearing on a petition which seeks a waiver of the rule in question. Storer B/casting Co., 14 RR 742 (1956).

Likewise, even in adjudicatory proceedings, where issues of law only are presented, the matter may be disposed of on the pleadings, without a hearing, without cross-examination, and without oral argument -- without contravening the Fifth Amendment. Federal Communications Commission v. Station WJR, 337 U.S. 265 (1949). Similarly, even in an adjudicatory proceeding, an administrative agency may go outside the record and take official notice of facts which have not been tested by cross-examination and predicate its decision thereon--without violating the Fifth Amendment where such facts are not disputed. 5 U.S.C. Sec. 1006(d). Furthermore, even in adjudicatory proceedings (e.g., deportation of an alien or denial of a passport where "national security" is involved) the agency may reach a result without "full disclosure of the considerations entering into a decision" -- thus depriving a person of a right of confrontation, cross-examination, and conclusions rationally flowing from findings predicated on record evidence. Jay v. Boyd, 351 U.S. 345 (1956).

In short, what constitutes a due process hearing, even in so-called adjudicatory proceedings, varies with the issues involved. In some situations due process includes the right of confrontation, the right of cross-examination, the right to specific findings on evidence of record, and the right to rational conclusions predicated on such findings. In other situations, even in so-called adjudicatory proceedings, it may include none of these.[1]

Just as the type of hearing required by the Fifth Amendment in a so-called adjudicatory proceeding may vary with the issues and circumstances, so it may vary in a so-called rule-making or legislative proceeding. To begin with, as this Court has made clear, the mere fact that an administrative agency elects to handle a problem by "rule making"rather than by "adjudication," or chooses to label the proceeding "rule making" rather than "adjudicatory," is not decisive. Philadelphia Co. v. Securities and Exchange Comm., 84 U.S.

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1 " 'Due process of law' is not a term of fixed content. It may vary as circumstances vary." L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 190, 170 F. 2d 793 (1948), per Prettyman, J., concurring.

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App. D.C. 73, 175 F. 2d 808 (1948), dismissed as moot, 337 U.S. 901 (1949). There, the Philadelphia Company, a registered holding company, owned all the stock of Pittsburgh Railways and was a guarantor of its obligations. Pittsburgh, in process of reorganization, was a "non-utility subsidiary" of a registered holding company, subject to the Public Utility Holding Company Act unless exempt by action of the SEC. Under an SEC rule, Pittsburgh was exempt. The SEC issued notice of a proposed rule which would deny exemption to a subsidiary in reorganization whose securities were guaranteed by a registered holding company. The SEC invited comments, views, written data and oral argument on the proposed rule, but denied Philadelphia's request for a "hearing". In holding that the SEC had improperly denied Pittsburgh an adjudicatory hearing (with attendant procedural rights), this Court reasoned (p. 81) that the action was "adjudicatory" because it was "particular and immediate", rather than "general and future" in its effect. See also National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 248, 132 F. 2d 545 (1942), aff'd 319 U.S. 239 (1943); L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 170 F. 2d 793 (1948); Londoner v. Denver, 210 U.S. 373 (1908); Radio Commission v. Nelson Bros. Co., 289 U.S. 266 (1933); and Morgan v. United States, 304 U.S. 1 (1938).

Thus, just as the proposition is false that a "hearing" is always necessary in adjudicatory proceedings, so is the converse proposition that a "hearing" is never required for so-called legislative or rule-making action. An excellent further example is the famous first Morgan case, 298 U.S. 468 (1936) involving the fixing of future rates for stockyard services. Notwithstanding numerous precedents that such rate fixing is legislative (i.e., rule making)[1], the Supreme Court, in a situation where adjudicative facts were of the essence, stated (p. 480):

> A proceeding of this sort requiring the taking and weighing of evidence, determination of facts based upon the consideration of the evidence, and the making of an order supported by such findings, has the quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character.

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1 Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 286 (1908); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 50 (1936)

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Expressed another way, the need for determining and resolving "adjudicative facts" can and frequently does arise in so-called legislative or rule-making proceedings. This is well illustrated by contrasting Londoner v. Denver, 210 U.S. 373 (1908) with Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U. S. 44 (1915). The board in the Londoner case assessed the plaintiffs' lands for the cost of paving a street, giving plaintiffs a right to file written comments and objections but not an adjudicatory hearing on their particular assessment. The Supreme Court held that even in proceedings for taxation due process requires something more than the naked right to file written comments. However, in the Bi-Metallic case, a tax board by legislative fiat, without a hearing, increased the valuation of all taxable property in Denver by forty percent. Such action was sustained by the Supreme Court. Thus, in one instance legislative or rule-making action taken without a hearing was affirmed, in the other it was reversed. As Professor Davis points out (op. cit., p. 207), "the principle that distinguishes the Bi-Metallic case from the Londoner case is that a party in a tax or assessment case has a right to be heard when official action is based upon 'individual grounds', but not necessarily when official action is based on general grounds; that is, when the facts are adjudicative but not when they are legislative."

Eminent domain cases likewise highlight the point we are here making. A Commission on Public Roads may decide (by "rule making", if such proceedings have to be given a traditional "label") that a new highway should follow a certain course and that land needed for that purpose should be obtained by condemnation. But it cannot, under the guise of rule making, conclude that each tract of land thus condemned shall be paid for at the rate of one cent per square foot. In other words, the need for the taking turns on legislative facts (with the result that an adjudicative hearing is not required thereon), but the value of the specific property so taken is an adjudicative fact, which if disputed, requires quasi-judicial proceedings.

By way of summary, whether the proceeding be labeled "legislative" or "adjudicatory", due process requires that disputed "adjudicative facts" (i. e., facts pertaining to a particular party or a particular situation) not be found without a "hearing" (with an attendant right to present evidence, to demand findings predicated on such evidence, and to insist on rational conclusions flowing from such evidence).

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A perfect illustration of this point is this Court's decision in National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 132 F. 2d 545 (1942), aff'd. 319 U.S. 239 (1943). There, by rule the Commission had designated 850 kc as a Class I-A clear channel, meaning that no station other than KOA could operate nightime on the frequency. WHDH filed for nightime operation or 850 kc, asking that the rule be modified. Although KOA was allowed to "participate", it was not permitted to intervene in the proceeding. From action by the Commission granting WHDH's application, and modifying its rules accordingly, KOA appealed. This Court, speaking through Justice (then Judge) Rutledge, recognized (p. 245) that Section 303(f) of the Communications Act (47 U.S.C. Sec. 303(f)) is "primarily a rule-making or 'legislative' section". But this fact did not mean that KOA was not entitled to be heard in a proceeding to change 850 kc from a Class I-A to a Class I-B frequency. So to construe Section 303(f), Justice Rutledge said (p. 248) would "raise serious question concerning the section's validity both for want of essential minima of procedural due process in some opportunity to be heard as of right and for want of essential fair play in favoring one interested party [an applicant] unduly as against another [an existing station]." To the contention that in rule-making proceedings a hearing was not required, Justice Rutledge speaking for this Court said (p. 248):

> The foregoing views necessarily contemplate that the hearing provided by Section 303(f), under the proviso, has in such an application as this "quasi-judicial" rather than merely "legislative" effect. That is true, in my opinion, notwithstanding the Section's principal grant of power is to make rules. In such an application as this, the making of rules relating to the defined changes necessarily affects existing rights by changing them, and that is as true as if the change were made by order rather than by rule. When such an effect is achieved, whether by the one form of action or the other, the ordinary distinction between "quasi-legislative" and "quasi-judicial" action gives way before the elementary requirement that rights be not destroyed or impaired without hearing. The proviso requires hearing whether the change is in form "legislative" or "judicial".

Unless the foregoing concept that "adjudicative" facts (pertaining to a particular party or a particular situation) must be ascertained in either a legislative or adjudicatory proceeding by quasi-judicial methods (with the attendant due process safeguards for a valid factual determination), whereas legislative or policy facts can be ascertained in either type of proceeding in other ways (without such safeguards), administrative tyranny can run rampant.

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An example or two will suffice.

As this Court knows, in the AM (standard broadcast) field, the Commission has resolved Section 307(b) problems (whether one community is more in need of a particular service than another) by the "adjudicatory method" -- where findings and conclusions must conform to requirements laid down by this Court in the Johnston case. See Allentown Broadcasting Corp. v. Federal Communications Commission, 94 U.S. App. D.C. 353, 222 F. 2d 781 (1954). In television, on the other hand, even at a time when the Commission was recently proposing to abolish its Table of Allocations, the Commission has resolved Section 307(b) problems by rule-making proceedings (where it has contended that Johnston concepts are inapplicable). See Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954).

Did Congress, in writing, with some emphasis, due safeguards into the Communications Act in 1952 in order to protect existing licensees, intend to permit the Commission to decide the self same adjudicative facts in one fashion when it chose to approach the problem in an adjudicatory proceeding, and in a different fashion when it chose to decide the same matter in a so-called rule-making proceeding in those situations where the impact of the Commission's action is "particular and immediate"? Since the Commission regards itself as "hamstrung" by due process requirements where it proceeds in adjudicatory fashion, and deems that it has almost carte blanche authority when it proceeds by rule making, is there no limit to the "adjudicative facts" which the Commission may "resolve" under the guise of rule making, and thus dispense with Ashbacker, Johnston, and other safeguards delineated by the Courts? For example, could the Commission (when confronted with two AM applications for the same frequency in Easton and Allentown) give notice of rule making to determine whether that frequency should be used in Easton or Allentown, invite written comments, and then decide by a "concise general statement" that the frequency should be utilized in Easton, and accordingly dismiss the Allentown application? If so, Ashbacker and Johnston might as well be written off the books.

Could the Commission, when confronted with a television application by a Democratic newspaper in Town X (which has an AM station on 1230 kc) and with a television application by a Republican newspaper in Town Y (which has an AM

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station on 1240 kc), institute a rule-making proceeding, and after appropriate notice and comments, adopt a rule (allegedly in furtherance of diversification of mass media principles) that it would not grant a television channel to a newspaper applicant in cities with AM stations operating on 1230 kc, but that it would grant a television channel to a newspaper in cities with an AM station operating on 1240 kc? We think not, and this Court said as much in Philadelphia Co. v. SEC, supra.

As Professor Davis has pointed out, the Courts have been searching for an answer to this problem. As he has soundly demonstrated, we get nowhere by stating that a given proceeding is "rule making" and hence that a hearing and attendant due-process safeguards are not required, or that a given proceeding is "adjudicatory" and hence that a "full hearing" is needed. Adjudicative facts in either type of proceeding must be determined by the judicial method. National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 132 F. 2d 545 (1942), aff'd 319 U.S. 239 (1939); Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 175 F. 2d 808 (1948).

Where "adjudicative facts" must be resolved (as illustrated by the Morgan case), some so-called rule-making proceedings require "more due process" than certain types of adjudicatory proceedings (e.g., passport and alien deportation proceedings where the national security is involved). The real test is whether the issues in the proceeding require a resolution of "adjudicative facts" (i.e., facts pertaining to a particular party or a particular situation) as distinguished from "legislative" facts bearing upon law, policy, or discretion in general. An administrative agency cannot vitiate constitutional and statutory safeguards by labeling a proceeding as "rule making" where in reality "adjudicative facts" pertaining to a particular party or a particular situation are being resolved.

Were "adjudicative facts" resolved in the instant proceeding? If so, was petitioner entitled to findings based on the evidence and to conclusions rationally flowing from those findings?

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III

The Proceeding to Deintermix Madison Required an Ascertainment by the Commission of Adjudicative Facts

In 1952, when the Commission allocated Channel 3 to Madison after a general rule-making proceeding which culminated in the Sixth Report, it did so on the basic assumption (then justified) that the intermixture of VHF and UHF channels would result in the manufacture of nothing but all-channel receivers, that these two classes of channels in combination would implement Sections 303(g) and 307(b) of the Communications Act (47 U.S.C. Sec. 303(g) and 307(b)) and that UHF would become in due course "an integral part of a single, nationwide television service."[1] See Radio Wisconsin, Inc., 8 R.R. 823 (1952).

Thus, as the Commission itself stated in its November 10, 1955 Orders, the concept of intermixed channel assignments was "basic" to the structure of television allocations established by the Sixth Report and Order (13 RR 1517, par. 7). Accordingly, the Commission concluded on November 10, 1955 "that any modification of the Table of Assignments which would involve significant departures from this system of [intermixed] assignments requires a thorough examination of the entire television structure," which should not be approached on a piecemeal or ad hoc basis until various possible over-all solutions have been considered on a "broad, nationwide basis." 20 Fed. Reg. 8501 (para. 7). Since there was abundant evidence that UHF channels in VHF areas were becoming "paper allocations" and not "radio service" contemplated by Section 307(b) of the Communications Act, the Commission instituted a general rule-making proceeding with a view to taking an over-all look at its Sixth Report (Docket No. 11532). 20 Fed. Reg. 8501.[2]

On June 26, 1956, after painstaking study of the many different proposals submitted to it in its general rule-making proceeding, the Commission released its Report and Order in Docket No. 11532, 13 RR 1571. In that report, to use the words of this Court, the Commission concluded that intermixture on

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1 Sixth Report of April 14, 1952, 1 RR Pt. III, pp. 91:661-665.

2 The Commission's refusal to hold VHF comparative proceedings in abeyance in UHF areas while it was restudying its Sixth Report resulted in a number of appeals to this Court. Since the Commission had decided "to adhere to the 1952 allocations for the time being," while the Sixth Report was being re-examined in Docket No. 11532, this Court sustained actions of the Commission making VHF grants in the interim in UHF markets. Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 255, 234 F. 2d 686 (June 7, 1956).

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a nationwide basis was a "failure." Jacksonville Journal Co. v. Federal Communications Commission, 101 U.S. App. D.C. ___, 246 F. 2d 699, 700, 15 RR 2045, 2046 (1957). Pending a further study on the advisability of ultimately moving all television into the UHF band (thus eliminating the intermixture problem), the Commission concluded (as an interim measure) that it would determine on a case-to-case basis whether the deletion of a VHF channel in a predominantly UHF area would "improve the opportunities for effective competition among a greater number of stations," in line with the mandate of Section 303(g) of the Act requiring the Commission to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)). The intermixture concept, which had been "basic" to the Sixth Report, was thus repudiated, with the Commission recognizing at long last that the utilization of a "wide coverage" VHF channel in a predominantly UHF area could result in less service rather than more service.

In order to implement the conclusions thus reached, the Commission reinstated (with new docket numbers) the five "pilot" and eight other de-intermixture proposals which it had dismissed on November 10, 1955, with a view to considering anew, on a case-to-case basis, the advisability of de-intermixing particular areas.[1] General principles for correcting the consequences of the 1952 policy of intermixture, where feasible, by eliminating a VHF channel in a UHF area, were delineated in the June 26, 1956 Report (five criteria). The individual notices required the parties to submit data on each of these criteria (R. 1-2).

The ascertainment of the facts (whether a given market should or should not be deintermixed) was to be determined in individual proceedings covering each market where it appeared to the Commission that the elimination of a VHF channel might "improve the opportunities for effective competition among a greater number of stations." Thus, Docket No. 11754 was instituted for the sole purpose of determining whether the factual situation in the Madison area, under the general criteria established in Docket No. 11532 (a general rule-making proceeding), warranted the deletion of Channel 3 in Madison (R. 1-2). Petitioner submitted a counterproposal in which it suggested that

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1 The Madison case became Docket No. 11754.

Madison be made all-UHF and that Rockford be made all-VHF. The Commission agreed to consider this proposal in Docket No. 11754 (R. 104-105).

In short, what result should be reached in Docket No. 11754 turned on the ascertainment of "adjudicative facts." Would the utilization of Channel 3 in Madison jeopardize existing UHF stations in Madison and/or Rockford, and prevent those cities from having multiple local outlets? Would the deletion of Channel 3 augment the opportunities for more effective competition among a greater number of stations in the Madison-Rockford area, in line with Congressional policy embodied in Sections 303(g) and 307(b) of the Communications Act?

A more specific factual problem, turning on "adjudicative facts" relevant to particular stations and operations in a specific market, would be difficult to formulate. Pertinent "legislative facts," applicable to the VHF-UHF situation in general, had been properly determined and enunciated in Docket No. 11532 (a general rule-making proceeding), to wit, that "intermixture" was a failure, that the policy of intermixing VHF and UHF in the same markets was no longer a sine qua non to the allocation table, that deintermixture should be utilized (as an interim measure) to improve opportunities for more effective competition among a greater number of stations in areas which met certain tests there laid down -- thereby rectifying (so far as possible) the unfortunate consequences of the intermixture policy adopted in 1952. By their very nature, these individual proceedings though labeled "rule-making" called for the ascertainment of "adjudicative facts" -- the effect of a VHF operation in Madison on existing UHF licensees presently serving Madison and Rockford. The impact of any decision thus reached was "particular and immediate," rather than "general and future." Philadelphia Co. v. Securities and Exchange Comm., 84 U.S. App. D.C. 73, 175 F. 2d 808 (1948) (dismissed as moot, 337 U.S. 901 (1949); National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 248, 132 F. 2d 545 (1942), aff'd 319 U.S. 239 (1943); Morgan v. United States, 298 U.S. 468 (1936), ibid, 304 U.S. 1, (1938).

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IV

Petitioner Was Entitled to a Due Process Determination of the Factual Issues Inherent in Docket No. 11754

Petitioner is a licensee of the Commission -- it is not a mere applicant. It has limited property rights in the facilities by which it is providing a UHF service to the Rockford area. L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 181, 170 F. 2d 793 (1948). One VHF station (Channel 13 in Rockford) is already providing city-grade service over Rockford and a Grade B signal in the Madison area. The conclusion reached in Docket No. 11532 that intermixture had proved a "failure" stems from the fact (with the nonmanufacture of all-channel receivers) that UHF cannot survive, let alone compete effectively, with VHF stations in areas receiving multiple VHF signals -- a fact which the Commission itself has now recognized: "Our experience in other markets convinces us [that] the advent of a second VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of existing UHF stations to continue to provide service in the area", 22 FCC Reports 293, 302 (para. 19)[1]. Whether petitioner's UHF station, in direct competition with a VHF station in a city the size of Rockford and serving an area receiving multiple VHF signals from Milwaukee, Chicago, Davenport-Rock Island-Moline, can continue to operate against a new station in Madison which places a strong Grade B signal over Rockford is highly problematical.

Thus, the retention of Channel 3 in Madison will have a direct impact on petitioner's present and future operations in Rockford. If it does not destroy petitioner's operation altogether, it will as a minimum render its license less valuable and less useful. With the advent of a second VHF signal over Rockford, existing UHF sets will be replaced as they become obsolete with less expensive VHF-only sets, thus reducing petitioner's coverage just as completely and just as detrimentally as a grant which would create electronic interference. Petitioner is accordingly entitled to a due process determination whether such impingement on their existing licensed operations

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[1] Cf. Commission's brief in WIRL Television Company v. F.C.C. (Case No. 13,768 et al, p. 26: "It seems clear that despite the head start of the /two/ UHF stations in Peoria operation there by one VHF station proposed in 1952 is likely to seriously jeopardize the continued successful operations of one or both of the existing UHF stations as well as any real possibility of the successful development of a fourth station." See also Channel Assignment to Columbia, S. C., 15 RR 1682, 1688 (1957).

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will serve the public interest. See National Broadcasting Co. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 132 F. 2d 545 (1942), aff'd 319 U.S. 239 (1943); Metropolitan Television Co. v. United States, 95 U.S. App. D.C. 326, 221 F. 2d 879 (1955).[1] Cf. Great Western B. Ass'n. v. Federal Communications Commission, 68 U.S. App. D.C. 119, 123, 94 F. 2d 244 (1938); Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 71, 77, 202 F. 2d 298 (1952); National Broadcasting Company, Inc. v. United States, 319 U.S. 190, 217 (1943).

Because of the alleged impact of a Channel 3 operation in Madison on existing UHF operations in Madison and Hartford, petitioner was entitled to a threshold due process determination whether the retention of Channel 3 in Madison would or would not impinge on existing UHF operations, whether the elimination of Channel 3 would result in more services in those areas, and whether people in Rockford and Madison might be left without multiple competitive services if Channel 3 remained in Madison. See L. B. Wilson, supra, If it were determined as a fact that the retention of Channel 3 in Madison would jeopardize existing UHF stations in Madison and Rockford, such matters would be germane to a determination whether Channel 3 should be utilized in Madison, placed "on ice" or shifted elsewhere.

The Commission having instituted a proceeding (Docket No. 11754) to determine whether Channel 3 should be deleted from Madison, in order to "improve effective competition among a greater number of stations" in that area, petitioner had standing as an existing licensee of the Commission to submit evidence on what effect the commercial utilization of VHF Channel 3 in Madison would have on its existing operation in that area. What is equally important, petitioner was entitled to findings based on the evidence compiled in that proceeding and to conclusions rationally flowing from such findings. Johnston Broadcasting Co. v. Federal Communications Commission, 84 U.S. App. D.C. 40, 175 F. 2d 351 (1949).

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1 The Coastal Bend and Greylock cases are not to the contrary. There the Commission had not yet repudiated the intermixture concept which was basic to the Sixth Report. As made clear by this Court, the Commission had decided to continue to adhere to that Report and that concept, at least until it found (as a result of a general rule-making proceeding then in progress) that intermixture would not work and that a feasible alternative was available. Subsequent to the actions complained of in those appeals, the Commission has found as a fact (in Docket No. 11532) that intermixture was a failure, and that VHF channels should be eliminated where to do so will improve the opportunities for more effective competition among a greater number of UHF stations. Petitioner is thus entitled to a due process determination by the Commission on whether the retention of a second VHF station in Madison-Rockford will destroy or jeopardize its UHF operation and thus result in less service rather than more service in Wisconsin and Illinois. See Harbenito Broadcasting Co. v. Federal Communications Commission, 94 U.S. App. D.C. 329, 218 F. 2d 28 (1954).

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Since petitioner did not demand that the record (in Docket No. 11754) be compiled by a "trial-type hearing" (confrontation and cross-examination), the Court is not here faced with a decision whether in a so-called rule-making proceeding an oral (as distinguished from a written) hearing is an essential element of due process - in situations where the impact of the Commission's action on existing licensees is "particular and immediate."[1] But in acquiescing in a "written hearing" in Docket No. 11754, petitioner did not waive other "due process" safeguards -- a right to rebut (by written data) facts developed by other parties to the proceeding, a right to findings predicated on pertinent evidence thus submitted, and a right to conclusions based on such findings. The question whether, in the above-enumerated particulars, petitioner was denied "essential minima of procedural due process of law" in Docket No. 11754 is thus squarely before this Court. That petitioner was denied a decision conforming to the requirements of the Johnston case has already been shown (supra, pp. 17-36). That it was denied a right to rebut answering data is equally apparent.

The Notice of Rule Making in the instant proceeding (Docket No. 11754) called for written comments (R. 1-2) -- opening comments to be filed on or before December 3 and answering comments on or before December 28, 1956 (R. 110-113). The notice foreclosed rebuttal comments except for "good cause" (R. 1). Voluminous opening comments were filed on December 3 and answering comments on December 28. In its answering comments Radio Wisconsin, Inc. made much of the fact that if Channel 3 were shifted to Rockford (with a transmitter in Orangeville) its signal would penetrate the Madison area (R. 567-568).

Petitioner accordingly sought leave on February 25, 1957 to file additional comments in which it pointed out that if Station WCIA on Channel 3 in Champaign shifted its transmitter site to the southwest, Channel 3 could be utilized south and west of Rockford (at a distance of 60-70 miles from

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1 This Court in Philadelphia Co. v. Securities and Exchange Comm., supra, has heretofore held that, on demand, a trial-type hearing is an essential element of due process in such situations. No trial-type hearing was demanded by petitioner in Docket No. 11754 for a very good reason. In petitioner's view, confrontation and cross-examination, the usually thought of initial requirements for an evidentiary or trial-type hearing, are often of less importance in determining engineering and economic facts (at least where credibility and demeanor problems are not raised) than the due process assurance that when the record is eventually compiled (be it by the written or oral method) the findings will be predicated on the record and rational conclusions will be drawn therefrom. Petitioner is prepared to live with written hearings (where credibility does not become an issue), if it can be assured that the evidence which it presents will be considered, that findings will be predicated on the record, and that rational conclusions will be drawn from the findings.

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Madison) from whence it would place little or no signal in Madison but nevertheless provide a city-grade service to Rockford. Petitioner offered to pay the expenses of such a move by Station WCIA (R. 769-791).

Petitioner further pointed out that such a shift in WCIA's transmitter location would improve the UHF picture in Peoria and Bloomington (R. 776) and that a shift of Channel 3 from Madison to Rockford would compensate the state of Illinois for the loss of a VHF channel it would suffer by the shift of Channel 2 from Springfield to St. Louis (R. 777-778). Finally, petitioner showed that if Channel 3 were used in the Orangeville area its signal could be suppressed in the direction toward Madison by directional means and concentrated toward Rockford, thereby obviating any intermixture problem in Madison (R. 776, 787-790). Leave to file those comments was denied by the Commission, because of the "lateness" of the request and because "the offered solution would not cure all the deficiencies" in the proposal to shift Channel 3 to Rockford (R. 798, para. 16). Having thus rejected data highly pertinent to the public interest questions then before it, the Commission nevertheless proceeded to use the penetration into the Madison area of the signal from Orangeville as its primary excuse for not deintermixing Madison and/or Rockford (R. 797-798, para. 15).

While we are not here asserting a right to an oral hearing in Docket No. 11754, we do say that where an administrative agency, in the interest of expedition, uses the written method for compiling a record and reaching a decision which will have a "particular and immediate" impact upon existing licensees, it runs afoul of due process when it arbitrarily refuses a reasonable opportunity to rebut answering facts -- particularly where (as here) the agency used the unrebutted data as its primary excuse for not removing Channel 3 from Madison (R. 798).

But whether the Commission rightly or wrongly refused to entertain additional comments, we submit that on the record compiled by either the written or oral method, where the impact of the Commission's action on an existing licensee is "immediate and particular," such person is entitled to a decision predicated on findings of facts supported by the evidence, and to conclusions rationally flowing from such findings. This we have not had.

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We accordingly ask this Court, to repeat for the third time, that where adjudicative facts are in dispute (in either a so-called rule-making or a so-called adjudicatory proceeding), due process requires the administrative agency to receive evidence, to make basic findings thereon, and to draw rational conclusions therefrom. Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 175 F. 2d 808 (1948), dismissed as moot, 337 U.S. 901 (1949); National Broadcasting Company, Inc. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 248, 132 F. 2d 545 (1942), aff'd 319 U.S. 239 (1943).

Even if the only protection which a licensee has, where the Commission elects to decide a specific problem by rule making, is that spelled out in Section 4 of the APA (5 U.S.C. Sec. 1003), we deny that the Report and Order of March 1, 1957 in the Madison case satisfies even the requirements of a general rule-making proceeding. Section 4 of the APA expressly provides for the submission of written data, and precludes the promulgation of a rule until "after consideration of all relevant matters presented." The notice in Docket No. 11754 expressly called for data on the five general criteria which were to be utilized (as a result of a general rule-making proceeding) in determining whether deintermixture would improve the opportunities for more effective competition among a greater number of stations in a given market (Madison). That proceeding was subsequently expanded to include Rockford (R. 104-105). Written evidence was submitted by petitioner (and others) on each of these criteria. There is nothing in the Report and Order of March 1, 1957 showing that the Commission, in passing on relative needs of the two areas, gave any consideration to the consequences which would follow from the utilization of a second VHF operation in the Madison-Rockford area. Various alternative proposals were completely ignored. How can it be said that the evidence has been "considered," in the absence of "findings" or "statements" in the Report and Order showing that it was considered? In short, even in general rule-making proceedings the administrative agency (if not held to the high degree of strictness outlined in the Johnston case) must at least articulate its reasons for the result it

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reached in such a way that a reviewing court can determine whether the result was or was not reached "after consideration of all relevant matter presented" and in line with basic concepts laid down by Congress in the statute under which the Commission functions.

The importance of proper findings, so that the reviewing court can determine whether basic policies laid down by Congress in a governing statute are being effectuated, is illustrated by the case of Schaffer Transportation Company v. United States, decided by the Supreme Court on December 9, 1957, 26 Law Week 4039, 4042. There, though dissenting from the Court's action reversing an administrative agency, Justice Frankfurther recognized "that the Court's decision may serve a useful purpose if it will lead the Interstate Commerce Commission, despite its enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action."

CONCLUSION

It has been shown that the manner in which the Commission decided adjudicative facts pertinent to the deintermixture of the Madison-Rockford area not only contravene due process but also statutory safeguards laid down by Congress. The action complained of should be reversed with instructions to the Commission (a) to consider rebuttal data submitted by petitioner on February 25, 1957; (b) to consider alternative uses delineated in petitioner's original comments and in its petition for reconsideration, and (c) to weigh the evidence, make findings of fact based on the evidence, and reach a conclusion supported by its basic findings.

Respectfully submitted,

JAMES A. McKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson
1735 DeSales Street, N. W.
Washington 6, D. C.

Counsel for Petitioner.

February 11, 1958.

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APPENDIX A

Constitutional and Statutory Provisions

Amendment V, U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Communications Act of 1934, as amended. 47 U.S.C. Sec. 151, et seq.

Sec. 303(f): Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

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Sec. 307(b): In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 316(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

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BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,066

WINNEBAGO TELEVISION CORPORATION, Petitioner

v.

UNITED STATES OF AMERICA, and
FEDERAL COMMUNICATIONS COMMISSION, Respondents

RADIO WISCONSIN, INCORPORATED,
GREATER ROCKFORD TELEVISION, INC., Intervenors

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 29 1958
Joseph W. Stewart
CLERK

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

VICTOR R. HANSEN,
Assistant Attorney
General,

DANIEL M. FRIEDMAN,
Attorney,

Department of Justice
Washington 25, D. C.

WARREN E. BAKER,
General Counsel,

RICHARD A. SOLOMON,
Assistant General Counsel,

JOHN J. O'MALLEY, JR.,
Counsel,

Federal Communications Commission
Washington 25, D. C.

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STATEMENT OF QUESTIONS PRESENTED

Counsel for the parties entered into a Prehearing Stipulation approved by order of this Court dated October 24, 1957 in which counsel for respondents agreed that the following issues are specified in the Petition for Review. Respondents do not concede the correctness of any legal or factual premises implicit in the formulation of the issues and reserve the right to argue that one or more of the issues are not properly before the Court:

1. Whether the Commission's refusal to deintermix Madison (by shifting Channel 3 to Rockford or by reserving it for educational use in Madison) contravened Sections 303(g) and 307(b) of the Communications Act and deprived petitioner of statutory and constitutional rights.
2. Whether the Commission, particularly in the light of the results reached in other related proceedings where deintermixture was considered, was arbitrary and capricious in selecting and weighing the factors which it did in the Madison-Rockford deintermixture proceeding.
3. Whether the Commission's refusal to deintermix Madison contravened policy pronouncements in Docket 11532 and if so whether such action constituted reversible error.

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4. Whether the Commission erroneously failed to give appropriate consideration to petitioner's proposals for minimizing or eliminating any signal in Madison from a Channel 3 allocation in Rockford.

5. Whether the Commission in refusing to deintermix Madison erroneously placed the "private interest" of a person who relied on the Sixth Report above the "interest of the public" in an efficient competitive nationwide television service.

6. Whether the Commission considered all relevant matter presented, whether the evidence supports the findings made, and whether the findings in turn warrant the conclusions reached.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,086

WINNEBAGO TELEVISION CORPORATION, Petitioner

v.

UNITED STATES OF AMERICA, and
FEDERAL COMMUNICATIONS COMMISSION, Respondents

RADIO WISCONSIN, INCORPORATED,
GREATER ROCKFORD TELEVISION, INC., Intervenors

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Since petitioner's Statement of the Case is unduly lengthy and argumentative the following Counterstatement is submitted.

Winnebago Television Corp. (Winnebago) essentially seeks review of the Commission Report and Order released March 1, 1957 (22 FCC 356, R. 792-802)[1/] which terminated a rule making proceeding instituted by the Federal Communications Commission (the Commission) on its own motion on June 26, 1956 to determine whether the only commercial VHF television channel allocated to Madison, Wisconsin in 1952 should be

1/ Winnebago is also appealing from the denial by the Commission on June 26, 1957 of its petition for reconsideration of the March 1, order (R. 869-873).

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reserved, instead, for educational television there (R. 1-2); or, alternatively, reassigned to Rockford, Illinois, in place of Rockford's only commercial UHF channel (R. 792). Winnebago is the licensee of television station WTVO in Rockford 55 miles south of Madison.[2/]

Since the background of these television deintermixture cases has been thoroughly discussed so many times both in briefs and opinions of the Court[3/] our statement of the facts will be kept as brief as possible.

The Commission in its Table of Television Channel Assignments of 1952 intermixed the UHF and VHF television channels which it assigned to Madison by allocating one VHF channel (Channel 3) and three UHF channels (Channels 21, 27, and 33), one of which (Channel 21) was reserved for non-commercial educational television (17 Fed. Reg. 4059 (1952)). Monona Broadcasting Co. (Monona) and Bartell Television Corp. (Bartell) applied for the available UHF television channels.

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2 / Neither Monona Broadcasting Co. nor Bartell Television Corp., permittees of UHF television stations in Madison, have taken appeals from this rule making decision.

3 / For a complete background discussion see, e.g., Coastal Bend Television Company v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); Gerico Investment Company v. Federal Communications Commission, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957); Jacksonville Journal Company v. Federal Communications Commission, __ U.S. App. D.C. __ 246 F.2d 699 (1957); Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F.2d 727 (1956); cert. denied, 352 U.S. 935; and WIRL Television Co. v. United States and Federal Communications Commission, Case Nos. 13768, 13769, and 13912 (D.C. Cir. March 27, 1958). Winnebago intervened in the Coastal Bend cases, supra, but urged reversal.

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Since there were no qualified competing applicants, both were allowed to go on the air without first having gone through a comparative hearing - Monona went on the air on Channel 27 on July 8, 1953 while Bartell commenced operation on Channel 33 on July 20, 1953. Meanwhile, since intervenor Radio Wisconsin, Inc. (Radio Wisconsin) as well as other qualified applicants had applied for VHF Channel 3 a comparative hearing was necessary. Consequently, Radio Wisconsin (to which Channel 3 was awarded) was not granted a construction permit until December 12, 1955.[4/] In Rockford, Illinois (55 miles to the south of Madison) Winnebago, like Monona and Bartell, went into operation on UHF Channel 39 on April 29, 1953 without having gone through a comparative hearing.[5/]

In the latter part of 1954 and early 1955, however, Winnebago, Monona and Bartell petitioned the Commission to institute rule making proceedings looking toward the deintermixture of both Madison and Rockford. These petitions were among many filed by UHF stations in various parts of the country seeking the same general relief. The Commission in response to these petitions instituted five "pilot" rule making proceedings looking toward the deintermixture of

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4/ Radio Wisconsin completed construction and commenced regular operation on June 24, 1956.

5/ Likewise, intervenor Greater Rockford Television, Inc. (Greater Rockford) went on the air on VHF Channel 12, Rockford, on October 1, 1953, without having gone through a comparative hearing.

Madison and Rockford as well as Hartford, Connecticut; Peoria, Illinois; Evansville-Hatfield, Indiana; and Albany-Schenectady-Troy, New York. Extensive pleadings were filed in these five proceedings and after oral argument the Commission on November 10, 1955, denied these petitions on the ground that the allocation problem was one which was nationwide in scope and could not be solved by local or piecemeal deintermixture. Simultaneously with the denial of these petitions the Commission instituted a new general rule making proceeding (FCC Docket 11532) to determine the basic lines upon which the Commission would approach a solution of this nationwide problem. 6/

On June 26, 1956, the Commission released its Report and Order in the general rule making proceeding. (13 Pike & Fischer, R.R. 1571) in which it reviewed and rejected numerous proposals which had been submitted as long-range nationwide solutions to these allocation problems. Among those rejected was a proposal to deintermix VHF and UHF channel assignments in individual markets throughout the country while at the same time utilizing both VHF and UHF bands in the nationwide television system. The Commission

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6/ The Commission's denial of these rule making petitions as well as its refusal to hold up grants of applications for new VHF television stations in Corpus Christi, Texas, Evansville, Indiana, and Madison pending the conclusion of the Docket 11532 proceedings was sustained by this Court in the Coastal Bend cases (Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956)).

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stated in rejecting this proposal (Second Report on Deintermixture, 13 Pike & Fischer, R.R. 1571 at 1576):

> "There are serious obstacles to a more extensive nationwide program of deintermixture at this stage. Thus there is little support for the elimination of VHF assignments in areas with little UHF set saturation. In other instances the elimination of local VHF channel assignments would not accomplish effective deintermixture owing to the local reception from VHF stations located in neighboring communities. In still other cases the elimination of local VHF assignments would be impracticable at this stage owing to the fact that substantial "white areas" would be created. It seems doubtful for these reasons that the elimination of VHF channel assignments would be practicable at this stage in a sufficient number of communities to encourage significantly increased nationwide use of the UHF band. Nor would this technique alone satisfy the need for increasing the number of outlets in many markets, both large and small, which are at present inadequately served, and which accordingly offer only limited opportunities for competition among stations, among networks, and among other program and revenue sources."

The Commission concluded that the gradual transfer of all television broadcasting to the UHF portion of the spectrum (thereby opening up the VHF spectrum space for use by other services) should be studied as a very promising permanent solution to the overall nationwide allocation problem. Recognizing that prior to the institution of any such basic change considerable data with respect to technical problems in the use of the UHF band would be required, the Commission stated that it would do all that it could to aid a program of intensive research into the matter by both Government and industry. No formal rule making proceedings looking toward possible implementation of the plan were to be instituted until the Commission

had the opportunity to study the comments and data which would be submitted.[7/]

The Commission report then took up the question of the interim action which it might take in individual areas pending resolution of the long-range problems already discussed in order "to improve the opportunities for effective competition among a greater number of stations" until such time as the feasibility of a move to the UHF band might be established and implemented (13 Pike & Fischer, R.R. 1571, at 1851). This objective, it felt, might be achieved in some markets by either adding a third or fourth VHF channel to particular communities where this was possible under the rules, or by reassigning one or more VHF channels from communities in which established UHF operations gave promise of healthy survivial in the absence of VHF competition and where such reassignment would not deprive substantial numbers of persons of their only opportunity for television service. The Commission pointed out that because

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7/ In furtherance of this objective the Commission was instrumental in having established the Television Allocations Study Organization (TASO) in which representatives of the broadcast stations, both UHF and VHF, the national networks, the electronic manufacturing industry, and the educational broadcasters participate. TASO is engaged in a number of important technical studies of the allocation problem and its transmitting and receiving equipment corollaries. The Commission has cooperated fully with TASO and its staff members preside at the meeting of its various components, approving meeting agenda and acting as observers in a number of the more technical committees and subcommittees.

of the widely varying circumstances in individual communities and the numerous factors to be considered, no rigid criteria could be established which would automatically cover all situations. However, certain general factors which would militate in favor of eliminating or adding VHF channels were set out.[8/]

At the same time, the Commission indicated its belief that it appeared to be feasible to consider revisions of the Table of Assignments in line with its interim program in some

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8/ The Commission stated that "in markets with one or more commercial VHF channels, the merits of proposals to eliminate a VHF channel would depend, in large part, on such factors as:

1. Whether significant numbers of people would lack service as a result of the elimination of the VHF channel.
2. Whether one or more UHF stations are operating in the area.
3. Whether a reasonably high proportion of the sets in use can receive UHF signals.
4. Whether the terrain is reasonably favorable for UHF coverage.
5. Whether, taking into account all the local circumstances, the elimination of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

Similarly the Commission noted that the desirability of assigning additional VHF channels to communities would depend principally upon:

1. Whether it is possible to locate the new transmitter so as to meet the minimum transmitter spacings.
2. Whether, in cases where it is necessary to move the channel from another city, there is greater need for the channel in the area to which it is proposed to be assigned.
3. Whether the addition of a new VHF assignment would be consistent with the objectives of improving the opportunities for effective competition among a greater number of stations." (See 13 Pike & Fischer, R.R. 1571, 1582.)

13 communities.[9/] Accordingly, on the same day, it issued Notices of Proposed Rule Making looking toward the addition or elimination of commercial VHF channels in these 13 communities.

In Madison, one of the thirteen, in which two UHF and one VHF commercial stations were on the air (as well as a non-commercial educational television station on UHF Channel 21), the Commission proposed to switch the educational station from Channel 21 to Channel 3 and to switch Radio Wisconsin which was operating on that Channel to UHF Channel 21 (R. 1-2). All interested parties were invited to file comments with respect to the proposal. Radio Wisconsin on July 16, 1956, petitioned for reconsideration of the institution of the rule making proceeding and on July 27, 1956, it requested an adjudicatory-evidentiary hearing (R. 3-17). These requests were denied as premature by the Commission on November 30, 1956 (R.123-126). Winnebago petitioned for an amendment of the Notice of Proposed Rule Making to add a proposal to shift Channel 3 from Madison to Rockford and in its place reassign Channel 39 from Rockford to Madison. Winnebago also requested the Commission to issue an order to it to show cause why its outstanding authorization for Channel 39 should not be modified to specify operation on Channel 3 (R. 70-76). The Commission denied these requests on October 24, 1956, stating that the rule making proceeding was broad enough to allow Winnebago to prosecute its proposals so that there was no need for an amended notice (R. 108-109).

9/ A 14th Community, Columbia, South Carolina, was subsequently added to this list on July 19, 1956.

Radio Wisconsin, as well as the Wisconsin Committee to Save Existing Rural Television Service, urged the retention of Channel 3 in Madison. Comments supporting deintermixture were filed by American Broadcasting Company (ABC) (R. 129-143, 606-637), Monona (R. 291-384, 659-726), and Bartell (R. 656-658). The Joint Council on Educational Television urged that no action be taken jeopardizing educational television in Madison, as well as all other markets (R. 144-151). The Radio Council of the State of Wisconsin stated that it did not object to a shift of the Madison educational television station from UHF Channel 21 to VHF Channel 3 "if funds can be procured to cover the expense involved" (R. 652.)

On March 1, 1957, the Commission (Commissioners Hyde, Bartley, and Lee dissenting) released its Report and Order denying the proposed reassignments and terminating the rule making proceeding (R. 792-802). The Commission, applying the general criteria which it had set out in its Report and Order of June 26, 1956 (see R. 794), concluded that a significant number of persons would lack any commercial television service in the rough areas to the north and southwest of Madison if commercial Channel 3 were removed from Madison either by reassign it to Rockford as a second commercial channel (R. 795-797), or by reserving it in

Madison for educational television (R. 793). Furthermore, the reassignment of Channel 3 as proposed would not enhance the probability that a greater number of television stations would operate in the area but, if anything, would tend to worsen the competitive situations with a resultant constriction in television service (R. 798).[10/]

Both Monona and Winnebago filed petitions for reconsideration of the March 1 order which were opposed by Radio Wisconsin and the Wisconsin Committee to Save Existing Rural TV Service (R. 832-834). On June 26, 1957, the Commission (Commissioners Hyde, Bartley, and Lee dissenting) released its Memorandum Opinion and Order denying the petitions for reconsideration (R. 869-873).

10/ On February 25, 1957 - one day before the Commission adopted its final Report and Order in this case - Winnebago had petitioned for leave to file additional comments (R. 769-772). The additional comments thus tendered suggested that if the transmitter of the television station operating on Channel 3 at Champaign, Illinois were compelled to move more than 20 miles to the south it would permit a Rockford Channel 3 station to locate its transmitter a distance of 65 to 70 miles from Madison rather than 43 miles. Even though the Commission in its March 1 order denied the petition for untimeliness it considered the merits of the comments and rejected the suggestion on the ground that the offered solution would not cure all the disadvantages inherent in a reassignment of Channel 3 to Rockford and, on the contrary "would aggravate the 'white area' situation to the southwest of Madison" (R. 798).

SUMMARY OF ARGUMENT

There were two rule making proposals before the Commission in this case -- one to reassign VHF Channel 3 from commercial to educational operation in Madison, Wisconsin; the other to reassign Channel 3 as a second commercial VHF channel to Rockford, Illinois, 55 miles south of Madison. The Commission's decision refusing to adopt either proposal was consistent with its decision in other simultaneous rule making proceedings and was based upon a rule making record which was made in full procedural accord with the Communications Act as well as the Administrative Procedure Act and in which all interested parties had an adequate opportunity to present their views to the Commission.

The Commission concluded that if it were to adopt the first proposal -- to reserve Channel 3 for educational use in Madison -- this action would in all likelihood harm rather than help the Madison educational television station since the history of educational television in Wisconsin indicated little likelihood that the necessary public funds would be appropriated for the move from the UHF channel to the VHF channel.

The Commission also concluded that if it were to adopt the second proposal -- to reassign Channel 3 to Rockford -- substantial areas would be created in the rough terrain approximately 50 miles to the north and southwest of Madison

in which large numbers of persons would lack any television service. Furthermore, the ultimate objective of the proceeding -- the creation of opportunities for competition among a greater number of television stations in Madison -- would be frustrated since the Madison UHF stations would be put into competition with at least one and possibly two Rockford VHF stations instead of one Madison VHF station. Under these unfavorable competitive circumstances the Commission believed that opportunities for effective competition between the UHF stations in Madison and the VHF stations in Rockford would not be enhanced and might actually be lessened by the channel switch and, therefore, the transfer would not serve the public interest even if it could be assumed that the Madison UHF stations facing such VHF competition from Rockford could and would improve their facilities to eliminate some or all of the white areas.

Winnebago's argument that the Commission should have also considered the alternative of deleting Channel 3 without reassignment elsewhere was not made to the Commission or raised in the Petition for Review. Therefore, it is barred by the Communications Act, Section 405 and Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957).

II.

The decision not to deintermix Madison does not involve any inconsistency in approach with the other proceedings in

which the Commission contemporaneously deintermixed certain other areas. For the factual situations in those other cases, considered as a whole, are clearly distinguishable. In each case, for reasons of terrain or otherwise, the Commission could properly conclude that the white area problem would be less serious than that obtaining in Madison. Moreover, in each case there was at least a possibility that the deleted channel could be used to enhance the competitive situation in other communities whereas in the Madison situation the assignment of Channel 3 to Rockford threatened to fesult in feeding back one or two VHF signals into Madison to the actual detriment of the competitive situation in the general area.

III.

Winnebago's legal argument that the Commission erred in not affording the parties an absolute right to file "rebuttal" pleadings was not raised before the Commission and cannot therefore be raised in this action. Ibid. In any event, Winnebago was given a full and fair opportunity to present its views to the Commission in accord with statutory criteria and even the additional pleadings which were filed by Winnebago long after the time for filing pleadings had expired were in fact considered on their merits by the Commission.

ARGUMENT

The Commission decision not to change the status of VHF Channel 3 in Madison was arrived at after a rule making proceeding in full conformity with the procedural requirements of the Administrative Procedure Act, Section 4, as well as the Communications Act. In view of the demonstrated lack of substantial financial support for educational television in Madison the Commission concluded that it would be contrary to the public interest to compel the educational station (now operating on Channel 21 at low power and antenna height and only 20 hours per week) to transfer its operations to VHF Channel 3 since the resulting need to purchase expensive television transmitting equipment would create the grave risk of terminating educational television in Madison (R. 793). In addition, the Commission found that in applying the criteria set out in its June 26,1956 Report and Order, there would be a significant number of persons who would not receive any commercial television service if Channel 3 were either reserved for educational use or reassigned to Rockford as proposed by Winnebago; and, finally, that there was a great likelihood that there would actually be fewer television services operating in the Madison-Rockford area if Channel 3 should be reassigned to Rockford and thus the very purpose of the rule making proceeding would be defeated. The Commission decision was reasonable

and adequately supported by the record. See WIRL Television Co. v. United States, Nos. 13768, 13769, and 13912, U.S. App. D.C., March 27,1958.

Winnebago's broad attack on the Commission decision rests on two basic arguments; one substantive, the other procedural. Winnebago argues substantively that the decision is arbitrary because the Commission did not reasonably apply the criteria which it set out in its Report and Order of June 26,1956 (see R. 794) to the evidence presented in the record of this case. More particularly, Winnebago contends that because of the number of persons who would lose their only television service if Channel 3 were deleted from Madison -- that is, the populations who would live in "white areas" -- (Pet.Br. 17-24); the number of UHF stations operating in the area (Pet. Br. 24-26); the percentage of all-channel sets in the area (Pet.Br. 26-27); the topography (Pet. Br. 27-28); and the likelihood that more services would be available if Madison were deintermixed (Pet. Br. 28-56), Madison was ideally suited for deintermixture and it was unreasonable for the Commission not to deintermix. Procedurally, Winnebago argues that it was denied due process because it was not allowed to file pleadings in addition to answering opposition pleadings. Particularly, it contends that the Commission was arbitrary in not permitting it to file additional comments long after the final date for filing had expired (Pet. Br. 50).

As we shall demonstrate below, Winnebago's substantive and procedural arguments are both without merit and this case should be affirmed on the authority of WIRL Television Co. v. United States, supra, and Sangamon Valley Television Corp. v. United States, No. 13992, U.S. App. D.C., May 1, 1958.

I. THE COMMISSION'S REFUSAL TO REASSIGN MADISON'S SOLE VHF CHANNEL WAS REASONABLE AND ADEQUATELY SUPPORTED BY THE RECORD.

In this proceeding the Commission gave careful consideration to the two alternative proposals advanced by interested parties to "deintermix" Madison either by reserving its only VHF channel for educational use or by reassigning it to Rockford. It rejected the first alternative as likely to be harmful to educational television operations in the area. It denied the second on grounds that the move to Rockford would neither solve a serious white area problem nor, because of Rockford's nearness to Madison, improve the chances for effective competition between a greater number of stations in Madison. Both of these determinations, as we shall show, are based on substantial record support and are clearly within the permissible range of Commission discretion.

The alternative of using Channel 3 for educational television in Madison was considered by the Commission but discarded as not in the public interest because of the relative lack of financial capacity, and interest in the proposal by

educational groups (R. 793, 798).[11/] The Wisconsin State Radio Council, licensee of the non-commercial educational television station operating on UHF Channel 21, Madison submitted initial comments in the proceeding. Its position was that it generally favored VHF over UHF for educational television, and it would not object to a shift from Channel 21 to Channel 3 if funds could be obtained to cover the expense involved (R. 651-652, 793). The Commission found little likelihood that adequate public funds would be appropriated for the move. It noted that the station's budget is now so low that it is operating on Channel 21 only 20 hours per week with only 10.7 kw of power and an antenna height of 230 feet above average terrain (as against a maximum authorized power and height of 5000 kw at 1000 feet); and that the people of Madison in 1955 indicated their lack of interest in providing funds for educational television by overwhelmingly rejecting a referendum proposal to establish a statewide educational television network. In light of these considerations, the Commission correctly concluded that the public interest would not be served by shifting the educational station to Channel 3 (R. 793), since

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11/ Winnebago incorrectly states (Pet. Br. 29) that the Commission ignored the alternative proposal of using Channel 3 for educational purposes in Madison. Winnebago actively opposed this proposal throughout the proceeding (R. 394-395) which the Commission found, after full consideration, would not be in the public interest since it might well terminate educational television in Madison. (See R. 793.)

such a shift might well sound the death knell of educational television in Madison. The Commission reaffirmed this conclusion on reconsideration, noting that the educational interests had not sought reconsideration.(R. 871).

In evaluating the feasibility of moving Channel 3 from Madison to Rockford, as Winnebago urged, the Commission noted that affirmative findings could be made with respect to two of the five specified considerations for deintermixing a community such as Madison, namely a high UHF set saturation in the area and operating UHF stations (two commercial and one educational) (R. 794). On the other hand, there was considerable rough terrain to the north and west of Madison in areas which because of the scattered population patterns would have to depend on Madison for their service (R. 795). This left two factors for evaluation: whether deletion of the VHF channel would result in loss of service to significant populations, and whether the move to Rockford would enhance competitive prospects for operating stations in the Madison area.

All the parties to the rule making proceeding agreed that if Channel 3 were deleted from Madison without compensating action, a large number of people would be left without any television service. That is, they would live in "white areas", one of which would be about 50 miles north of Madison and the other about 50 miles southwest of that city (R. 795). The parties sharply disagreed as to the

extent of these "white areas" -- Monona computing the "white areas" to cover 1,163 square miles with a population of 28,629; Radio Wisconsin computing the areas to total 3,164 square miles with a population of 102,159.[12/] The Commission recognized that the calculation of television "white areas" in a situation such as this is no easy problem. Since the measurement of service areas may be accomplished by different techniques and equipment, or calculated by using the Commission's propagation curves, there may be wide ranges in the various determinations of those areas (R. 795). However, the Commission concluded that the divergence between Monona's and Radio Wisconsin's computations was too great to be explained by mere differences in techniques and equipment (R. 795). The Commission made a careful engineering analysis of the data of both parties and concluded that the UHF signal measurements of Monona were much higher than they should be according to the Commission's rules; much higher than the measurements made by others in similar terrain; and Monona's measured fields were even greater in some instances than "free space" fields (R. 795).[13/] On the other hand, the

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12/ Winnebago did not submit data as to the extent of the "white areas" if Channel 3 were simply deleted from Madison.

13/ A "free space" field is the theoretical unreflected field intensity obtainable at a certain distance from a given transmitter height and power. This signal is the maximum obtainable since it does not take into account attenuation because of terrain, man-made objects, etc. See FCC Rules, Section 3.681 (47 C.F.R., 1956 Supp., Section 3.681).

measurements of Radio Wisconsin were found to coincide more closely with the best available data on UHF propagation.

Winnebago indicated that if Channel 3 were reassigned to Rockford and operated at maximum height and power that the "white area" would, in its opinion, cover 684 square miles with a population of 11,644 persons (R. 406,796). Radio Wisconsin, on the other hand, calculated that the total "white areas", including those to the north of Madison, would encompass an area of 1,672 square miles containing 59,233 persons if the Rockford station should operate with maximum antenna height and power and 2,145 square miles and 74,345 persons if Winnebago should operate on Channel 3, Rockford with its present antenna height of 650 feet and an assumed power of 50 kw (R. 566-567).[14/] The Commission again examined the engineering data of Winnebago and Radio Wisconsin, and once again ruled that the Radio Wisconsin data was more accurate (R. 796).[15/] Accordingly, the Commission concluded in the light of the more reliable Radio Wisconsin engineering data that the reassignment of Channel 3 to Rockford as proposed by Winnebago would create significant "white areas" (R. 566-567,

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14/ This would be 50% of maximum authorized power, but would be greater than the presently operating power of the Rockford VHF television station.

15/ The Commission also noted that the terrain to the north and west of Madison was rough enough to result in a number of UHF "white area" pockets even within the anticipated UHF coverage area (R. 796). While "white area" pockets apply also to VHF signals they are much more pronounced with UHF signals. See Television Allocations, Hartford, Conn.- Providence, R.R., areas, 22 F.C.C. 332, at 336-337.

796, 872). Even though the parties sharply challenged one another's engineering data prior to the March 1 order, neither Winnebago nor Monona challenged this judgment in their petitions for reconsideration by any factual showing (see R. 805-807, 827, 860-861).

This "white area" would, as the Commission noted, be offset somewhat by an existing "white area" of 96 square miles with some 4,000 people which would be covered for the first time by a Rockford Channel 3 station operating at maximum height and power.[16/] (R. 872.) The Commission properly indicated that this gain would not offset the much greater "white area" loss created to the north and southwest of Madison. But Winnebago argues that the Commission in determining the "white area" question failed to consider whether these Madison "white areas" might not be eliminated in whole or in part by an improvement in the UHF facilities of the Madison stations. This is based upon the statements made by Monona and Bartell that if Channel 3 were to be deleted from Madison they would either increase their power to 1000 kw and antenna height to 1200 feet or build satellite stations in Dubuque, Iowa and Portage, Wisconsin to fill in the "white areas".

In its original Report and Order of March 1, 1957, the Commission concluded that the possibility of such actions eliminating some or all of the "white areas" though generally

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16/ This results from the fact that the existing Rockford VHF station was not operating at these maximums. See p.24, infra.

material in allocation proceedings, was outweighed here by the fact that the assignment of the station to Rockford at a location which would meet the minimum mileage separations of the Commission's rules would still provide a strong signal to the Madison area, and thus still subject the Madison UHF stations to competition from at least one and possibly two VHF stations.[17] (R. 796-797). Under these circumstances the Commission believed that the opportunities for effective competition between the UHF stations in Madison and the VHF stations in Rockford would not be enhanced and might actually be lessened by a channel switch. Therefore it would not serve the public interest even if it could be assumed that under such unfavorable competitive circumstances the Madison UHF stations facing VHF competition from the south could and would take steps to eliminate the "white areas" in the Madison area (R. 796-798).[18] In the Memorandum Opinion on reconsideration, the Commission, in the face of further arguments by proponents of deintermixture that it had overlooked the

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17/ The Commission indicated that a strong possibility existed that the existing Rockford VHF station would increase its coverage in order to achieve competitive parity with the Channel 3 station (R. 798).

18/ Radio Wisconsin estimated (and Monona did not deny) that to provide service for the approximately 90,000 persons in the 2,000 square miles which the increased UHF facilities would purportedly serve the cost of improvement of the UHF transmitter or construction of the two satellites would exceed $300,000. In addition, Radio Wisconsin pointed out that there was no showing that Monona and Bartell were financially capable of improving their facilities which would be done at great cost for what would be, according to Monona, a very small increase in audience (R. 556).

possibility of filling in UHF "white areas" by increase in height and power by existing stations or the establishment of statellite stations -- arguments to which it had allegedly given weight in the Springfield and Peoria cases -- expressly reiterated its "white area" conclusions (R. 872). It pointed to the rough and broken terrain to the north and west of Madison, as well as the scattered populations and lack of communities which could be expected to support television stations, as factors compelling rejection of the contrary claims in the petitions (R. 872). In these circumstances, and in view of the fact that the Commission previously had rejected Winnebago's "white area" data as unreliable, we submit that the Commission did not act unreasonably in concluding that the proposals to increase the effectiveness of the Madison UHF stations would not adequately deal with the "white area" which would have been created by removing Channel 3 from Madison.

The final factor which the Commission considered was whether the deletion of Channel 3 would increase the likelihood of a greater number of stations operating in Madison and Rockford. The Commission concluded that if Channel 3 were reassigned to Rockford it would, if operated at maximum height and power, as proposed at the site furthest from Madison complying with the Commission's rules, put almost a Grade A signal into Madison, with its Grade B contours overlapping practically all of the Grade B contours of

the Madison UHF stations (R. 797). This coverage the Commission felt would preclude the effective deintermixture of Madison. And, it noted, the situation would be even worse if the Rockford VHF station on Channel 3 were moved closer to Madison. The Commission stated that the reallocation would also be likely to result in the other competing Rockford VHF station seeking competitive equality by increasing its coverage[19/] with the result that two strong outside VHF signals would be in competition with the Madison UHF stations instead of that of a single, local station. The likelihood of one of the five existing stations in the Madison-Rockford area being forced to cease operations under those circumstances would be much greater than under present allocations (R. 798).

Despite the lateness of filing, the Commission also considered the alternative proposal offered by Winnebago to relocate the transmitter of an existing Champaign, Illinois VHF station on Channel 3 in order to locate its own transmitter some thirty miles further southwest of Madison in order to avoid the possibility of a VHF station on Channel 3 in Rockford from covering Madison. Since this would place the Winnebago transmitter closer to the transmitter of the station operating on Channel 3, Champaign, Illinois than the Commission's rules

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19/ The Rockford VHF station is presently operating with an antenna height of 710 feet and power of 45.7 kw against maximums of 1000 feet and 100 kw.

allow, the Champaign transmitter would have to be relocated, as Winnebago recognized (R. 867). In addition, the Commission would be required to institute a new proceeding under Section 316 of the Communications Act, in which it would be required to prove at a public hearing that the public interest, convenience, and necessity would be promoted by the relocation of the Champaign transmitter. (See 47 U.S. C. Sec. 316). The Commission found that this alternative did not cure the defects in Winnebago's proposal as it would result in an increase in the white area southwest of Madison (R. 798). Likewise, Winnebago's proposal to directionalize the antenna of its Rockford VHF station so as to reduce the signal in the direction of Madison would also necessarily increase the white area to the southwest of Madison. 20/

Finally, Winnebago argues that the Commission should have considered the possibility of simply deleting the Madison commercial VHF channel without reassignment to either Rockford or as a non-commercial VHF channel for Madison. But this is an afterthought which comes much too late. Neither Winnebago nor any other party to the rule making proceeding in its

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20/ Winnebago incorrectly states (Pet. Br. 29) that the Commission ignored its proposal to make Rockford all-UHF. The Commission did not ignore the proposal but stated that since the proposal was a bare one which did not set forth any alternative channel for the existing VHF channel in Rockford or contain any other supporting data purporting to show deintermixture in Rockford would meet the Commission's criteria, it would not be considered further. (R. 792,) The question of whether the Commission properly considered this proposal as abandoned through lack of any supporting data was not raised before the Commission on re-consideration and cannot be raised now. Communications Act, Section 405, 47 U.S.C. Sec. 405.

original comments or on reconsideration even suggested that this possible solution of the allocation problems in Madison and Rockford would serve the public interest, or submitted data to support any such contention. The Commission was thus clearly not in error in confining itself to evaluation of the proposals which were suggested as being in the public interest. And, even assuming arguendo it should have considered this possibility on its own initiative, it is clear that its failure to do so cannot be raised as error by Winnebago here in the light of the provisions of Section 405 of the Communications Act, 47 U.S.C. Sec. 405. See Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957). Moreover, since this matter is not alleged an error in Winnebago's Petition for Review, it is also precluded from raising the question by the provisions of Section 4 of the Judicial Review Act of 1950, 5 U.S.C. Sec. 1034, governing review of Commission action under Section 402(a) of the Communications Act of 1934 as amended. See Stuart v. Federal Communications Commission, 70 App. D.C. 265, 267, 105 F.2d 788, 790 (1939); cf. RCA Communications, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 163, 167, 238 F.2d 24, 28 (1956).

II. THE DECISION TO RETAIN CHANNEL 3 IN MADISON IS COMPATIBLE WITH CONCURRENT DETERMINATIONS DEINTERMIXING OTHER AREAS.

Since the Commission in a number of other rule making proceedings initiated at the same time as the one involving Madison deleted the VHF channels from various areas, Winnebago, as might be expected, argues that the decision here is fatally inconsistnt with some or all of these other actions. In fact, however, the differing results reflect nothing more than separate evaluations by the Commission majority of the varying factors relating to the possibility of deintermixing an area. Since, as we have demonstrated above, the Madison decision represents a reasonable evaluation of facts presented in the particular proceeding, it is not erroneous merely because the result reached differs from that reached in Peoria and Springfield, Illinois; Elmira and Albany, New York;[21/] Evansville, Indiana, and Fresno, California. Nor can improper differences in approach be demonstrated by comparing similarities in the facts with respect to individual criteria in several proceedings, while, at the same time, ignoring controlling differences between the proceedings in other particulars.

21/ The Albany deintermixture decision, 22 F.C.C. 293, was later superseded by a new determination under which a third VHF channel was assigned to the area in lieu of deleting the two VHF assignments. (See 23 F.C.C. 358.)

Thus, one key factor distinguishing Madison from the Peoria,[22] Springfield,[23] Evansville,[24] and Fresno[25] cases where deintermixture was ordered was that, unlike in Madison and Hartford,[26] each of these areas was for one reason or another highly favorable for optimum UHF propagation. In the first three cases almost the entire area was flat, in Fresno a UHF transmitter, located on the high surrounding mountains, could cover the entire valley in which almost all of the potential viewers of a Fresno station lived. Under such circumstances the Commission concluded that withdrawing the technically superior VHF service was justified because other means for providing necessary service were or would become available. In Madison, however, where rough terrain was an admitted factor, the Commission could well take a more skeptical view of the efficacy of alternative means of providing service to the outlying areas which necessarily rely upon

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22/ Television Allocations in Peoria, Ill., areas, 22 F.C.C. 342, affirmed, sub nom. WIRL Television Co. v. United States, Case Nos. 13,568, et al., decided March 27, 1958.

23/ Television Allocations in Springfield, Ill. - St. Louis, Mo., areas, 22 F.C.C. 318, affirmed, sub nom. Sangamon Valley Television Corp. v. United States, Case No. 13,992, decided May 1, 1958.

24/ Television Allocations, Evansville, Ind., and Louisville, Ky., areas, 22 F.C.C. 382.

25/ Television Allocations in the Fresno-Santa Barbara, Calif., areas 22 F.C.C. 365.

26/ Television Allocations, Hartford, Conn.-Providence, R.I. areas., 22 F.C.C. 332, appeals pending, sub nom., Springfield Television Broadcasting Corp., et al. v. United States and Federal Communications Commission, Case Nos. 14,050 and 14,051.

Madison stations for reception. In all of these four cases, moreover, the deleted channels could be of use and, in fact, could be of valuable assistance in providing competitive service to the other areas. In Madison, however, the Commission concluded because of geographical limitations the questionable advantages of providing VHF competition in Rockford could only be at the expense of Madison services.[27/]

Nor is this Madison decision inconsistent with the decision in Elmira.[28/] For Elmira presents a case in which deintermixture was ordered in an area of relatively rough terrain where no immediate reallocation of the deleted VHF channel was accomplished. But here again examination of the entire picture reveals significant distinctions between the two situations which well justify the differing results.

27/ It is suggested that the Rockford situation does not materially differ from that involved in the Peoria case where the VHF station as reassigned would also put a usable signal back into Peoria. But the difference between the two cases, though one of degree, is nonetheless vital. For theRockford UHF station, located a maximum of 43 miles from Madison, would put almost a Grade A signal into Madison, whereas a Moline or Rock Island station would be approximately 60 miles from Peoria and place a much weaker signal into the Peoria area. (See WIRL Television Co. v. United States, supra, Joint Appendix at 67.)

28/ Television Allocations in Elmira, New York area, 22 F.C.C. 307.

In Elmira the Commission found, on the basis of estimates ranging from 539 persons to 30,681 persons (22 F.C.C. 312), that an insignificant white area would exist, whereas in Madison it found a significant white area in the light of Radio Wisconsin's estimates (which the Commission found to be most reliable) that 102,159 persons would be without a television service if Channel 3 were deleted. Even taking the estimate of 30,681 in Elmira (the one most favorable to Winnebago's case) it follows that three times as many people in the Madison area stood to lose their only service by deletion of the VHF channel than would do so by similar action in Elmira. Moreover, in the general Elmira area 6 UHF stations are in operation, 7 additional UHF permits granted, and competing applications are on file for still another UHF channel. Twelve other UHF channels had been allocated to cities within an 80-mile radius of Elmira. This is a far different situation from that prevailing in the Madison area where in addition to the two Madison UHF stations there are only two other operating commercial UHF stations serving any part of the area (in Rockford and Milwaukee) and there are no UHF stations in operation within many miles of the white area to the north of Madison. In fact only one UHF channel is assigned in that entire area and that to Richland Center, Wisconsin, a town of 4,608 population, 55 miles from Madison (R. 795).

While it is also true that the Commission in Elmira deleted Channel 9 without immediately reassigning it this does

not make the failure of the Commission, on its own initiative,[29/] to delete the Madison VHF channel without reassignment fatally inconsistent with the Elmira action. For the Commission in Elmira did not, as in Madison, reach a final conclusion that a reassignment of the channel deleted would be harmful rather than beneficial. Instead, it refrained from taking any immediate action to reassign Channel 9 deleted from Elmira because a clearance problem existed with Canada with respect to the most likely place for using that channel; and also because an alternative means of providing an additional VHF channel to this other community (Syracuse, N.Y.) existed which the Commission believed required full exploration. Moreover, in Elmira the VHF channel in issue had been just recently "dropped in" and, with a comparative hearing likely in view of the number of applications already on file, there was, unlike in Madison, no likelihood of making early use of the VHF channel's capacity for wide area coverage.

In other words, different factual situations produce different results even though individual factors in the differing cases may be similar. It is submitted that the decision of the Commission not to delete VHF Channel 3 from Madison was reasonably based upon evaluation of the facts in the Madison situation relating to the criteria set out in the Commission's June 1956 Report and Order, and as such is consistent with the other rule making decisions both deintermixing and failing to deintermix other areas.

29/ See pp. 25-26, supra.

III. WINNEBAGO WAS NOT DENIED PROCEDURAL DUE PROCESS.

Winnebago devotes extensive portions of its brief to the argument, never made to the Commission or raised in its Petition for Review, that the Commission proceeding, though rule making in nature, involved the determination of so-called adjudicatory facts; and therefore that Winnebago was entitled to the rights accruing to a party in a formal adjudicatory proceeding under the Administrative Procedure Act and the Communications Act. We see no reason to burden the Court here with a detailed discussion of this argument which is not properly before the Court (see Communications Act, Section 405),[30/] and which on its merits is directly contrary to the governing standards for rule making proceedings involving television channel allocations laid down by the Court in Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954); Van Curler Broadcasting Corp. v. United States, 98 U.S.App.D.C. 432, 236 F. 2d 727 (1956) and WIRL Television Co. v. United States, Case Nos. 13,768, et al., ___U.S.App.D.C.___, March 27,1958. We shall, however, briefly discuss the one specific procedural error which Winnebago has alleged -- the purported improper failure of the Commission to permit Winnebago to file so-called "rebuttal" comments, consisting of tardily filed additional comments over and beyond the original reply comments it filed in accordance

30/ In our brief in Springfield Television Co. v. United States, Case Nos. 14050 and 14051 now pending in this Court, the United States and the Commission have discussed in detail both the jurisdictional questions involved in this belated attempt to

with Commission's Notice of Proposed Rule Making.

The Commission in its original Notice of Proposed Rule Making (R. 1) inviting the filing of comments, allowed two and one-half months for the filing of original comments and 15 additional days within which the parties might file replies to those comments. The time for filing comments was subsequently extended so that a period of over five months was afforded in which to file original comments and twenty-five days for reply comments (R. 113, 546-7). The Notice also provided that no additional comments would be permitted to be filed unless "(1) specifically permitted by the Commission or (2) good cause for the filing of such additional comments is established." This provision was a clearly reasonable limit in view of the fact that the Commission was simultaneously considering interim action in thirteen areas and did not wish to drag these proceedings out for a term of years. No absolute bar was raised to the filing of additional comments which, the Commission stated, could be filed upon good cause shown. As indicated, Winnebago never argued to the Commission that due process required that it have the absolute right to file additional comments and this argument is barred here. Communications Act, §405, 47 U.S.C. §405, Albertson v. Federal Communications Commission, supra.

30/ (Cont'd) raise basic legal questions and the merits thereof. See pp. 18-35. What is said there is equally applicable here.

The petition for leave to file additional comments was filed by Winnebago on February 25,1957, almost two months after the date for filing reply comments had expired (R. 769). It made absolutely no effort to explain why the proposal there adduced for the first time -- to move the Champaign Channel 3 transmitter to permit a Rockford assignment 65 to 70 miles southwest of Madison -- could not have been filed within the extensive period of time specified by the Commission for original or reply comments. The matters raised in the additional comments did not refer to or "rebut" matters raised in the reply comments of the opponents to deintermixture in Madison. Under these circumstances the Commission was clearly correct in concluding (R. 798, 872) that the request to file additional comments was too late. But in any event the Commission both in its original Report and Order (R. 798) and in its Memorandum Opinion and Order on reconsideration (R. 872) expressly stated that the proposal contained in Winnebago's additional comments was defective on its merits since it would aggravate the "white area" situation to the south of Madison (R. 798, 872).

It is perfectly clear therefore that Winnebago was given a fair opportunity to present its views on the deintermixture questions involved in the Madison proceeding in complete accordance with the requirements of the Communications Act as well as the Administrative Procedure Act. It is equally clear that the Commission's treatment of the "additional comments" so tardily presented to it by Winnebago was completely ap-

propriate and did not improperly prejudice Winnebago's rights.

CONCLUSION

For the above-stated reasons the Commission orders on review in this case should be affirmed.

Respectfully submitted,

VICTOR R. HANSEN,
Assistant Attorney General,

DANIEL M. FRIEDMAN,
Attorney,
Department of Justice

WARREN E. BAKER,
General Counsel,

RICHARD A. SOLOMON,
Assistant General Counsel,

JOHN J. O'MALLEY, JR.,
Counsel
Federal Communications Commission

May 1958

BRIEF FOR INTERVENOR, RADIO WISCONSIN, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 15 1958
Joseph W. Stewart
CLERK

No. 14,086

WINNEBAGO TELEVISION CORPORATION,

Petitioner

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

RADIO WISCONSIN, INC.,
GREATER ROCKFORD TELEVISION, INC.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATION COMMISSION

Of Counsel:

Scharfeld & Baron
National Press Building
Washington 4, D. C.

ARTHUR W. SCHARFELD

ARTHUR STAMBLER

National Press Building
Washington 4, D. C.

Counsel for Intervenor,
Radio Wisconsin, Inc.

May 15, 1958

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

INTERVENOR'S STATEMENT OF QUESTION PRESENTED

1. The single issue in this case is:

Whether the Commission's action refusing on the basis of the record before it in this proceeding to amend its Table of Television Allocations to delete VHF Channel 3 from Madison, Wisconsin as a frequency available for commercial television operations and to reallocate Channel 3 as a commercial frequency to the city of Rockford, Illinois, contravened the requirements of Sections 303(g) and 307(b) of the Communications Act or was based upon an improper evaluation of the material before it with respect to the factors relevant to its determination whether the deletion of this Channel would be in the public interest, or was arbitrary and capricious in the light of other Commission determinations.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,086

WINNEBAGO TELEVISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

RADIO WISCONSIN, INC.,
GREATER ROCKFORD TELEVISION, INC.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR RADIO WISCONSIN, INC.
(Station WISC-TV, Madison Channel 3)

I - COUNTER-STATEMENT OF THE CASE

Intervenor, Radio Wisconsin, Incorporated (hereinafter referred to as Radio Wisconsin) is the licensee of commercial television Station WISC-TV which operates on VHF television Channel 3 at Madison, Wisconsin.

The instant Petition for Review challenges the Commission's decisions of March 1, 1957 and June 24, 1957 which reaffirmed and retained the allocation of television Channel 3 as a commercial frequency at Madison, Wisconsin as part of its nationwide Table of Television Assign-

ments, after considering and rejecting proposals to delete that channel for reallocation, either as an educational non-commercial facility in Madison or shifted as a commercial facility to Rockford, Illinois.

Petitioner Winnebago Television Corp. (hereinafter referred to as Winnebago) is the licensee of television Station WTVO operating on UHF Channel 39 at Rockford, Illinois. It appeals from that part of the Commission's decisions which denied Winnebago's counter-proposal that Channel 3 be deleted entirely from Madison and be reallocated to Rockford to be used there by its Station WTVO in place of its present UHF frequency.[1]

* * * *

It is believed that a more accurate and meaningful statement of relevant facts than that presented by Petitioner Winnebago would assist the Court. Intervenor submits that Winnebago's Statement is so unduly argumentative, and so partisanly fragmentary as to fail to meet the requirements of Rule 17(c)(5) of this Court calling for "all facts material to the consideration of the questions presented, with references to the... record...." Accordingly, such statement would appear inappropriate for use by the Court in considering this appeal.

Radio Wisconsin believes it neither necessary nor appropriate for it to attempt to respond to and controvert in detail the argumentative conclusions respecting varied phases of television development which permeate Winnebago's Statement, as well as much of its Brief. That Intervenor does not so undertake should not be construed as its agreement with such assertions as accurately portraying general principles, particular facts, or even reasonable hypotheses. They often do not. It is sufficient here, however, to offer as a minimum truth that the television matters concerned are infinitely more complex and the data vastly more multiform than the over-simplified, self-serving conclusionary allegations in which Winnebago's Brief is dressed.

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[1] Because of FCC mileage separation requirements, Winnebago's proposed Rockford Station on Channel 3 was to be located at Orangeville, Illinois, some 30 miles from Rockford and 43 miles from Madison. (R. 799, Par. 13).

While the Court has acquired a general familiarity with VHF-UHF television allocation matters, brief reference to certain background facts should illuminate the present controversy. VHF Channel 3 was originally assigned at Madison in the Commission's 1952 Sixth Report and Order pursuant to compelling statutory and administrative allocations principles, expressly including the existence of and need for VHF's wider and superior coverage around that city. That decision concluded a four-year nationwide allocations proceeding involving all channel assignments. In it the Commission, reaffirming the need for the comprehensive, nationwide approach, first formulated basic allocations principles and then constructed the fixed nationwide Table upon them. (1 Pike & Fischer Radio Regulation (RR), Part 3, 91:599, Pars. 12-14, 17, 579(f), 591). This Court has upheld the Commission's authority to develop such a nationwide Table through rule making and to limit its subsequent licensing process to applications for Table assignments. Logansport Broadcasting Corporation v. United States, 93 U. S. App. D. C. 342, 210 F. 2d 24.

Despite the recent agitation concerning the matter of intermixture of VHF and UHF television channels, that allocations principle still remains a keystone of the nationwide Table. It was initially, in the face of widely recognized VHF superiorities, made a primary and universal principle in formulating the Table. (Sixth Report and Order, Pars. 25, 189-199). Thus, requests to design allocations to insulate UHF against otherwise appropriate prospective VHF channels were all denied. Included were counter-proposals to reserve Madison Channel 3 for education so that all commercial assignments could prospectively be placed in the UHF band there. (Id.; Radio Wisconsin, Incorporated, 8 Pike & Fischer RR 323, 467).[1] Intermixture in Madison permitted UHF to become uniquely well entrenched there, with its three local UHF stations obtaining quick and uncontested grants and with them a three-year headstart over its sole VHF station on Channel 3. Although Radio Wisconsin's first

[1] A somewhat later request for post hoc propter "deintermixture" made by a Madison UHF station during the pendency of the Madison Channel 3 comparative proceeding was also denied, primarily because no "clear and compelling showing" had been made justifying the extreme action urged. (FCC Report and Order, 11/1/54.)

Madison VHF application was filed in 1948, its WISC-TV construction permit, due to varied administrative procedural difficulties such as the "freeze" and wait for comparative hearing, was not granted until December 1955 and its station, WISC-TV, went on the air on June 24, 1956.

Intermixed assignments were likewise established in Rockford. There, VHF channel 13 (in use since September 1953 by Station WREX-TV) was allocated together with UHF Channels 39 (on which petitioner operates pursuant to a CP obtained without hearing in April, 1953) and 45, reserved but not in use. To so provide, the Commission in 1952 denied a counter-proposal to shift VHF Channel 13 from Rockford to Chicago, although no opposition to it came from Rockford interests or subsequent applicants. (Id., Pars. 507, 509).

While television generally experienced a "tremendous growth" since lifting of the "freeze" in mid-1952, "post-freeze" development in certain areas recognizedly failed to meet hoped-for goals. (Notice of Proposed Rule Making, Docket 11532, December 12, 1955, 20 Fed. Reg. 8501). The status of UHF and its interrelationships with VHF have been particular--but by no means the sole--problem areas (Ibid). Fundamental allocations matters have accordingly continued to concern the Commission, as well as others interested in television development (Ibid.).

* * * *

Against this background, the Commission in March-November of 1955 held "pilot" proceedings on proposals by certain UHF stations for "selective deintermixture" of VHF channels in five cities, including Madison, "in the hope" that it might therein evolve the basis for some future policy of general applicability. (13 RR 1511, Par. 1). Both Radio Wisconsin and Winnebago inter alia participated in that Madison Channel 3 proceeding with positions and comments basically similar to those later respectively urged by them in Docket 11754. The Commission in November 1955 denied all pending "selective deintermixture" proposals in the five cities (as well as others not yet then heard), as unmeritorious and not in the public interest. It concluded that such basic scheme for case-to-case consideration of proposed fundamental revisions in its allocations plan was an unsound, improperly limited and fortuitous approach. Only

the traditional, nationwide and overall approach, it held, could be effective and meaningful in attempting resolution of the basic problems of expanding TV service and strengthening UHF. (Id., Pars. 4-8).

On that same day, the Commission instituted a nationwide allocations proceeding (Docket 11532) "to consider possible over-all solutions to the problem on a broad nationwide basis." As "only one of a number of possible solutions", both substantive and procedural, the Commission referred to proposals for "deintermixture on a basis consistent with a nationwide solution" (20 Fed. Reg. 8501, Par. 6). Radio Wisconsin inter alia participated in this proceeding, reiterating the admitted need for any proposed solution to be nationwide in scope.

This Court en banc subsequently upheld the Commission's general denial of the proposals for "selective deintermixture" and its refusal to "stay" VHF permits then resulting from long-standing comparative proceedings (including WISC-TV's on Madison Channel 3) pending further allocations proceedings. (Coastal Bend Television Co. v. Federal Communications Commission, 98 U. S. App. D. C. 251, 234 F. 2d 686.)

The Commission's decision in that general rule making proceeding was its Report and Order of June 26, 1956 (13 R. R. 1571). While therein expressing general adherence to the basic principles of the Sixth Report & Order, the Commission undertook as a possible solution to further TV development a long-range inquiry into the possibility that all TV broadcasting might at some indefinite future time be shifted into the UHF. (Id., Pars. 2, 16-26). It recognized the necessity, however, that it first explore and ascertain the practical possibilities of UHF use, to consider and determine whether or not the major difficulties inherent in an all-UHF system could be overcome so that some program for its establishment might at some indefinite future time be formulated (Id.). To do so the Commission expressed willingness to "cooperate fully with all interested groups in the orderly conduct" of such necessarily long-range research and development program. (Id., Par. 20). While this program is ostensibly still pending, the time for filing comments in it has been indefinitely extended and there are now no prescribed FCC procedures or time limitations for its effectuation. (FCC Notice of October 4, 1956, 21 Fed. Reg. 7743.)

At the same time the Commission rejected proposals for an extensive or nationwide system of "selective deintermixture" of VHF channels. It concluded that the "white areas" that would be created and the difficulty of effectively deintermixing due to VHF reception from outside stations precluded such a system on any sufficiently extensive scale to "encourage significantly increased nationwide use of the UHF band." (Id., Par. 15). Despite this, the Commission's next breath resurrected the same approach in a few communities, allegedly for a new and different purpose.

The possibility of some "interim action" was deemed worthy of consideration by the Commission pending the long-range, indefinite and speculative outcome of its inquiry into a possible all-UHF system. Accordingly, the Commission on its own motion simultaneously instituted nine separate and distinct proceedings, including Madison Channel 3, proposing to consider on a case-to-case basis in each the possible deletion and reallocation of its respectively allocated VHF channel for the alleged purpose of possibly increasing the opportunity for effective competition among a greater number of stations in such city.[1] In "some markets" the Commission declined even to institute proceedings looking toward such possible VHF deintermixture primarily because VHF service in those cities from outside VHF Stations made doubtful the achievement of any effective deintermixture. (Id., Par. 36).

The Commission indicated that "the widely varying circumstances in individual markets and the numerous factors...." involved, precluded application of fixed and rigid criteria to any particular proceeding. It listed, however, a number of specific factors which would have "important bearing" on its case-by-case reallocations decisions in each of the

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1 In addition to Madison, "deintermixture" to delete VHF channels was proposed in Hartford, Evansville, Fresno, Peoria, Springfield and New Orleans, as well as in Elmira and Vail Mills (N.Y.) in which two cities VHF channels had only recently been added by the Commission. The four other proposals to add a VHF channel to provide cities with their 3rd or 4th VHFs were of course a totally different matter. (Id., Par. 36) In all, only 9 of the total of 575 VHF channels, in 9 of the 353 cities with VHF frequencies, were proposed for deletion by "deintermixture". None of these cities ranked among the 20 largest in the country. They included, however, 4 of the 5 in which like proposals for "selective deintermixture" had been summarily rejected only 7 months before.

particular proceedings. (Par. 31).[1]

The separate Commission Notice of June 26th, 1956 commencing the Madison Channel 3 proceeding (Docket 11754) provided for comments pro or con the proposal to be filed by September 10, 1956, with reply comments due 10 days thereafter. It proscribed any further comments unless specifically requested by the Commission or unless good cause for their filing were established. (R. 1-2). Extensions of time to file having been provided, comments by interested parties in Docket 11754, including Intervenor Radio Wisconsin and petitioner Winnebago, were finally filed on December 3, 1956 and reply comments thereto were filed on December 28, 1956.

On its part, Radio Wisconsin's Comments first attacked the reallocations proposal as violative of law, both substantively (as exceeding the Commission's lawful powers and the mandate of Sections 1 and 307(b) of the Communications Act), as well as procedurally (in improperly derogating its permittee's statutory rights to a full hearing on the proposed modification of its authorization). Wholly apart therefrom, however, it went on to demonstrate with voluminous data directed toward the specified criteria, that the proposed reallocation of Madison Channel 3 would not improve the opportunities for effective competition but would rather destroy needed and existing television service for an unnecessary, specious and ineffectual purpose, and so was otherwise contrary to the public interest. (R. 150-290, 548-605). Radio Wisconsin's further requests during the proceeding for a full evidentiary hearing pursuant to Sections 303(f) and 316 of the Communications Act on the proposed modification of its Madison Channel 3 authorization were denied by the Commission. Similarly denied were Radio Wisconsin's requests for subpoenas duces tecum directed against the UHF proponents of deintermixture so as to effectuate its asserted statutory right to a full factual hearing in the matter. (R. 123-126, 545).

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1 The so-called "interim reallocations" policy pursuant to which these proceedings were commenced is, in fact, a misnomer. These proposed actions were not interim in the conventional sense of preliminary to and pending some determined and consistent long-range activity. Here the proposals could be and appeared interim to nothing. No long-run action was even proposed; what was only contemplated in the face of admitted major obstacles might well never be adopted at all.

Just prior to release of the Commission's March 1, 1957 final decision and immediately following widespread publicity in the trade press of final Commission actions to come on February 26th on several "deintermixture" proposals, including denial of that concerning Madison Channel 3,[1] petitioner Winnebago on February 25 filed a number of additional pleadings aimed at substantially expanding its position in Docket 11754. These included a "Petition For Leave To File Additional Comments", such "Additional Comments", and a "Petition for an Order to Show Cause" to be directed to the licensee of operating Station WCIA at Champaign, Illinois as to why it should not move and relocate its existing TV station 20 miles further south, in order that Winnebago might modify its comments and proposals to the Commission. No showing was made as to why the pleadings could not have earlier and timely been filed. (R. 768-772).

The Commission's March 1 Memorandum Opinion and Order denied the proposals for reallocation of Channel 3, reaffirmed and retained that Channel as part of its nationwide Table of Assignments (its Rule 3.606) and terminated the proceedings in Docket 11754. Its detailed bases therefor were set forth in its decision and will be presented hereinafter. (23 FCC 356-365). The Commission also therein denied as untimely Winnebago's request for leave to file additional comments. (Id., Par. 16).

* * * *

On or soon after March 1, 1957, the Commission released the series of separate decisions concerning other cities and channels where, in separate dockets involving different local parties and distinctive factual records, it had considered possible "deintermixture". In brief summary, the respective reallocations proposals for Madison and Hartford were denied and those VHF channels retained (22 FCC 332, 356); in New Orleans, an initial proposal to delete VHF was denied and counter-proposals to add a VHF channel were instead adopted; (Id. 396); in Vail Mills, (Albany-Schenectady-Troy) a decision to deintermix VHF channels was originally adopted but shortly thereafter reversed and the Commission not only

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[1] Television Digest, February 23, 1957, p. 2.

restored such VHF channels but also assigned an additional VHF frequency there (Id. 293; 23 FCC 358)[1]; in Peoria, Springfield, and Elmira deintermixture proposals were adopted and VHF channels deleted (22 FCC 307, 318, 342); in Evansville and Fresno tentative decisions were made that there should be reallocation, with show cause evidentiary proceedings now being held or pending to determine whether the VHF channels now in use by operating stations in those cities should in fact be deleted. (22 FCC 382, 365).[2]

The Commission's June 24, 1957 Memorandum Opinion and Order denied petitions for reconsideration directed against its March 1, 1957 decision by Winnebago and by one of the Madison UHF stations. (R.864-8). The Commission therein reaffirmed its prior conclusions and its ultimate decision as being required on the particular facts and circumstances of the Madison Channel 3 proceeding. It rejected the contention that its Madison decision was inconsistent with decisions respecting other communities by emphasizing that each rested separately upon the distinctive hearing records and the television needs and demands respecting each individual community.

II - PROPRIETY OF THE QUESTIONS RESPECTIVELY PRESENTED FOR REVIEW

The sole question properly before the Court on appeal, as set forth on page i, infra, concerns the validity of the Commission's refusal to delete television Channel 3 as a commercial facility from Madison, Wisconsin, and to reallocate it at Rockford, Illinois. All other issues raised by petitioner Winnebago in its Brief of February 11, 1958 are jurisdictionally defective, not properly before this Court and should not be considered by it.

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1 Winnebago throughout its Brief refers to and relies upon the Commission's original Vail Mills decision without even indicating the subsequent decision and as if such reversal had never occurred.

2 Since that time the Commission has not ordered the deintermixture of any VHF station or permittee, has denied other such proposals, and is presently considering such action in only two relatively small communities. In the interim, however, additional permits for new VHF stations have continued to be granted, and increases in VHF station operating powers and antenna heights (and consequently in their coverage areas) have regularly been approved.

These defective issues stem from Winnebago's allegations of Commission errors which it may not now raise insofar as these alleged errors: (a) have not aggrieved or adversely affected Winnebago; and/or (b) have not been raised in its Petition for Review herein; and/or (c) were not raised by it before the Commission in the Docket 11754 proceeding; and/or (d) are expressly contrary to Winnebago's position in that proceeding; and/or (e) are otherwise now improperly asserted by it.[1] Such pervasive defects reflect the fact that (prior to its Brief) petitioner Winnebago had exclusively proposed and supported the reallocation of Channel 3 to Rockford as a "windfall" for its own personal use, and has thus had no direct interest per se in the "deintermixture" or any local disposition of Madison's channels.

Before proceeding to consider the merits of the single issue here properly open for review, Radio Wisconsin believes it would assist the Court to have before it a brief seriatim summary of the jurisdictional and other such defects in the Winnebago Brief. These include:

1. The Brief's entire Sections II, III and IV alleging procedural errors, involve matters not raised by Winnebago before the Commission, on which the agency had any opportunity to pass, were not raised in the Petition for Review and were contrary to its position before the Commission. (See Sec. IV - D-2 below).
2. The matter of an alleged erroneous failure to reserve Channel 3 for education is one not aggrieving nor adversely affecting Winnebago, not raised by it before the Commission and was contrary to its position there. (See Sec. IV-C-1 below).
3. The asserted error in not placing Madison Channel 3 "on ice" was not raised before the Commission, does not aggrieve or adversely affect Winnebago, was not raised in its Petition for Review, and is contrary to its asserted position before the Commission. (See Sec. IV-C-2 below.)

[1] See Rule 38(a) of the Rules of this Court; Section 4 of the Judicial Review Act of 1950; Section 10 of the Administrative Procedure Act; Section 405 of the Communications Act of 1934; and also Sections IV-C and D-2 herein, with cases there cited.

4. The alleged erroneous failure to make Rockford all-UHF by deleting its VHF Channel 13, involves a matter not properly before the Court insofar as the Commission properly deemed it to have been abandoned for Winnebago's failure to file any supporting comments--to which conclusion Winnebago does not even except. (R. 792, footnote 1). It was also not raised by Winnebago in its Petition for Review herein.

5. Most of Winnebago's entire Section I argument is fatally defective in consisting only of bare conclusionary allegations of inconsistency between the Commission's decision in the Madison Channel 3 proceeding and some other selected reallocations decisions. These allegations are wholly unrelated to factual matters of record in the Madison proceeding or (assuming arguendo their relevance here) to the factual matters of record involved in any other separate reallocations proceeding.[1] Such an argumentative technique, with its total lack of supporting facts of record is improper, meaningless, and not susceptible to rational consideration, certainly not within the proper limitations of this appeal and the appropriate judicial review function.

6. The repeated argument of improper Commission refusal to consider the effects of Madison Station WISC-TV's service per se on petitioner's Rockford WTVO operations, is wholly new and makeweight. No such effects

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1 As one glaring example of such pervasive defect is its allegation that the FCC finding of "white areas" around Madison was in error because "Radio Wisconsin's evidence on this score was no more persuasive than comparable evidence adduced in the six proceedings where deintermixture was ordered" (Brief pp. 33, 19, 23-4). To permit such argumentative technique is improperly to impose on other parties an impossible burden, or at best a most difficult one, of marshalling such factual disproof as may exist in any other separate and complex proceedings, far beyond the appropriate ambit of the instant proceeding and appeal. That some of these improper allegations can be disproved or shown incorrect from such undisputed facts of record as may be available (see Section IV-B-1 below), is only an additional reason for the complete rejection of such an unsound approach.

> were ever previously claimed by Winnebago at any time before the Commission or in its Petition for Review.[1]

* * * * *

The above chronicle is most pertinent in establishing the defective, novel and makeweight nature of Winnebago's Brief, one primarily designed with complete disregard of the factual nature of the Docket 11754 proceeding before the Commission and the proper scope of the judicial review process concerning it. This is significant not merely as a defect in legal craftsmanship, but more importantly as demonstrating the total absence of merit in petitioner's appeal, which forces its resort to such an extreme and desperate position so far from that it asserted throughout before the Commission and initially to the Court.

III - SUMMARY OF ARGUMENT

The Commission's decision on the record of its Docket 11754 proceeding to retain and reaffirm the original and long-standing allocation of television Channel 3 at Madison, Wisconsin, and not to delete that frequency and reallocate it as had been considered, was an expression of its informed judgment on a matter of television allocations falling peculiarly within its administrative discretion. Such Commission decision being consistent with allocations principles as well as clearly reasoned and having a substantial (if not preponderant) factual basis in the record should be affirmed. The Court in the exercise of its limited judicial review function should not substitute its judgment as to the wisdom of the action or the weight of evidence for that of the administrative agency, best equipped to make such decisions. National Broadcasting Company v. United States, 319 U.S. 190; Coastal Bend Television Co. v. Federal Communications Commission, infra; WIRL Television Co. v. United States, ____ U.S. App. D.C., _____, _____ F.2d _____, (Slip. Op. March 27, 1958); Sangamon Valley Television Corp. v. United States, _____ U.S. App. _____ D.C. _____, _____ F.2d _____ (Slip. Op. May 1, 1958).

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[1] In fact, Winnebago's general references to other stations serving the Rockford area often failed even to include WISC-TV (R. 394-6; Petition for Review, p. 2).

(This Court's review and affirmation of the denial of reallocation of Madison Channel 3 may be had without its consideration and determination herein of the validity of the Commission's "interim reallocation" policy as proposed to be applied in Docket 11754. Radio Wisconsin's position on this appeal arguendo assumes such validity, although its expressed position before the Commission (and now) was to the contrary, namely that this entire Commission general policy and particularly its specific Madison proposal were unlawful and invalid. Winnebago's appeal is predicated upon validity, and it attacks only the alleged erroneous failure to apply such policy here to order deintermixture of Madison Channel 3. Should the Court, however, in other pending appeals where such substantive and procedural questions may be directly raised, strike down and generally invalidate either the Commission's general policy or the particular procedural applications of it, then Winnebago's appeal would on that basis alone fall with it. However, affirmation of the Commission's Madison Channel 3 decision is both possible and compelled wholly apart from any of these underlying legal and policy questions.)

The Commission, in applying its "interim reallocations" policy in Docket 11754 properly concluded as a matter of its informed and discretionary administrative judgment that reallocation of Madison Channel 3 would not achieve its contemplated policy objectives and would be against the public interest. The Commission's decisions are amply supported, if not required, by the proper findings and conclusions it reached upon the record of the Madison Channel 3 proceeding within the framework of the specified decisional criteria that:

(a) Reallocation would create substantial "white areas" without any recognized TV service and large "grey areas" with only one such service around Madison;

(b) The specific terrain to the north and west of Madison was rough and broken, and not favorable to UHF propagation;

(c) Effective "deintermixture" of Madison and area could not be achieved because of existing VHF service therein from outside VHF stations and, more importantly, because Channel 3 reallocated at Rockford

would necessarily provide primary VHF service to Madison and over its UHF stations' coverage areas;

(d) Reallocation would not improve and would most likely worsen the competitive situation among stations in both Madison and Rockford; and

(e) Madison as the larger city (also with greater state and regional significance) clearly had greater need and entitlement under Section 307(b) of the Communications Act for its first wide-coverage VHF facility than had the smaller city of Rockford (for its second VHF). (R. 792-802, 864-8).

Denial of the appeal could alone if necessary rest on petitioner Winnebago's failure to present any valid and effective challenge to the Commission's findings and conclusions on the basis of the record of the Docket 11754 proceeding now before the Court for review. Winnebago's position is fatally defective in attacking such findings and conclusions only obliquely by argumentatively alleging decisional inconsistencies between the Commission's Madison Channel 3 decision and some other such decisions which involved different cities and channels in separate proceedings with dissimilar factual records. This improperly requires the Court to go outside the record of the instant proceeding, Brown v. Norfolk and Western Railway Co., 20 F. 2d 133 (4th C. C. A., 1927). Moreover, and equally significant, such Winnebago conclusionary arguments without reference to the record facts of this or of any other proceeding, are further fallacious and defective even arguendo were such reference otherwise permissible.

The validity of the Commission's refusal to reallocate Channel 3 from Madison to Rockford is the only issue properly before this Court for review. Other issues now urged by Winnebago concerning alleged Commission errors in failing to order other possible reallocations, are jurisdictionally defective for a variety of reasons, are not properly before this Court and should not be considered by it. Section 405 of the Communications Act; O'Neill Broadcasting Company v. Federal Communications Commission, 100 U. S. App. D. C. 38, 241 F. 2d 443 (1956);

Democrat Printing Co. v. Federal Communications Commission, 91 U. S. App. D. C. 72, 202 F. 2d 298 (1952). These issues, moreover, are otherwise without merit even were arguendo the Court disposed to consider them despite their fundamental jurisdictional defectiveness. This is true of the possible reservation of Channel 3 at Madison for education, which the Commission properly concluded on the basis of compelling and unchallenged facts of record would be contrary to the public interest. It is likewise true of the complete non-use of Channel 3, now newly urged by Winnebago, which would result in the heaviest loss of existing service and creation of vast "white areas" clearly contrary to the public interest.

The Commission's Madison Channel 3 decision is not only abundantly supported by the record in Docket 11754 but is (assuming arguendo the relevance of such comparisons) not inconsistent with other Commission reallocation decisions. The essence of the "interim reallocations" policy being case-to-case consideration of a particular proposed reallocation on its indigenous factual record, mere differences in ultimate results between some proceedings would not be inconsistency. As already shown, even Winnebago's allegations of inconsistency are unsound in being based on only isolated, selected, superficial and argumentative comparisons, improperly wrenched out of their respective factual and decisional contexts. Moreover, any precise comparison of Commission findings or undisputed facts on major criteria in the several proceedings (again assuming arguendo the relevance of any such procedure), makes clear that there are no such basic inconsistencies as charged between the several decisions. All alike involve the application of general criteria to the particular facts found in each, those facts in Madison being substantially unique, both severally and in the aggregate.

Finally, Winnebago's allegations of procedural error are wholly unmeritorious. In the first place, with only one minor exception, they are jurisdictionally defective in never having been urged before the Commission to afford it the opportunity for consideration required by Section 405 of the Communications Act. As such, they should be denied forthwith. O'Neill Broadcasting Co. v. Federal Communications Commission,

supra, Democrat Printing Co. v. Federal Communications Commission, supra. Further, even were the Court arguendo disposed to consider these allegations, they clearly are otherwise without substance. The procedures afforded Winnebago more than satisfied the statutory requirements laid down by the Administrative Procedure Act (Section 4) or otherwise applicable for consideration of its rule making proposal whereby it sought to obtain a "windfall" by reallocation of a television channel in which it had no right or interest. Winnebago's amorphous allegations of violation of some generalized procedural right cannot enlarge the procedural rights to which was entitled, and which it fully obtained.

There is no merit whatever in the only procedural question properly before this Court for review, which involves the validity of Commission denial of Winnebago's Petition for leave to file additional comments in Docket 11754. The Commission in the applicable circumstances was amply justified in denying this untimely, last-gasp and unjustified attempt to delay the conclusion of the Madison Channel 3 proceeding and unduly expand it. In all events, no basis exists or is shown for overruling the Commission's eminently reasonable procedural determination in an area in which it necessarily is given wide discretionary latitude to regulate its own administrative processes. Federal Communications Commission, v. WJR, The Goodwill Station, Inc., 337 U. S. 265; Shein et al v. United States, 102 F. Supp. 320, affirmed (per curiam) 343 U. S. 994.

IV. ARGUMENT

THE COMMISSION'S DETERMINATION THAT THE MADISON CHANNEL 3 ASSIGNMENT SHOULD BE RETAINED AND NOT REALLOCATED, WAS SOUND, CONSISTENT WITH CONTROLLING ALLOCATIONS PRINCIPLES, AMPLY SUPPORTED BY THE RECORD, AND SHOULD NOT BE DISTURBED

The Commission decisions here under review properly concluded that the original and long-standing allocation of television Channel 3 as a commercial frequency in Madison, Wisconsin, should be retained and that it should not be reallocated as had been proposed and considered in the Docket 11754 proceeding. This Commission reaffirmation (for the sixth time) that Madison Channel 3 was properly allocated and should

not be revised, was consistent with and pursuant to compelling allocations principles. These principles included those statutory ones set forth in Sections 1 and 307(b) of the Communications Act, their administrative echo in the Commission's Sixth Report and Order, as well as those it specified and applied in considering particular proposals under its novel "interim reallocations" policy. Any other Commission result would have been contrary to the record of its Docket 11754 proceeding and to its own administrative allocations criteria applied therein. More importantly, it would have severely contravened the overriding statutory principles that necessarily govern Commission allocations actions.

The matter of television allocations, as this Court has consistently held, is one peculiarly lying within the informed administrative discretion of the Commission and in which the agency necessarily has wide latitude. Such principle is basic to the statutory scheme of the Communications Act of 1934. Where -- as here -- the Commission's decisions in an area of discretion have a substantial factual basis in the record, where they are clearly reasoned and lie within the bounds of permissible administrative judgment, they should be sustained and not disturbed. No agency abuse of discretionary judgment or caprice having occurred or been demonstrated, the limited judicial review process should not interfere to substitute its judgment as to the weight of the evidence for that of the agency, nor to pass upon the relative wisdom or desirability of its regulatory actions.[1] That the weight of the record evidence herein and the analytic judgments thereon actually compel (much more than sustain) the Commission's decisions, is unnecessary to, but does make simpler, the judicial affirmation of the administrative determinations respecting Madison Channel 3.

* * *

(Radio Wisconsin here (and as its position throughout this Brief) assumes arguendo the legality and validity of the Commission's entire "interim reallocations" policy and procedures, both general and particular.

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[1] National Broadcasting Company v. U.S., supra; Logansport Broadcast Corp. v. U. S., supra; Coastal Bend Television Co. v. F.C.C., supra; Rochester Telephone Corp. v. U.S., 307 U.S. 125, 146, (1939); WIRL Television Co. v. U.S., supra; Sangamon Valley Television Corp. v. U.S., supra.

This includes the objective and techniques of such policy, and more particularly its proposed application to operating Madison Channel 3 in the Docket 11754 proceeding. In fact, however, Radio Wisconsin's position before the Commission was (and remains) that such limited reallocations system was fundamentally unlawful, as were the procedures used to consider its particular application to Madison Channel 3. In such view, this reallocation could not validly have been ordered for the purpose stated and in the manner considered, irrespective of the factual record of that proceeding. However, the Commission on the basis of the Docket 11754 record and the reallocations criteria having properly denied reallocation of Madison Channel 3, it is therefore unnecessary for the Court in affirming the Commission to consider or decide the otherwise underlying legal questions of the validity of that policy and its procedures. Petitioner Winnebago's position is, of course, entirely predicated upon such validity. It asserts error only in the Commission's alleged failure to order "deintermixture" of Madison Channel 3 pursuant to that general policy and its criteria. Were that policy and/or the Docket 11754 type of proceeding deemed invalid (as the Court may hold with respect to pending appeals raising those questions),[1] appeals such as Winnebago's here would ipso facto fall with it. Affirmation here, however, should follow wholly apart from such broader questions of policy and procedures).

A. Commission Reaffirmation Of The Madison Channel 3 Assignment and Denial Of Its Proposed Reallocation To Rockford, Was An Eminently Sound And Reasonable, If Not Required, Determination Upon The Record Of Commission Docket 11754

The Commission's Madison Channel 3 decisions are abundantly supported by, and in fact compelled by, its proper findings and conclusions made on the record of the Docket 11754 proceeding. These findings and conclusions, which are not directly challenged by Winnebago, are detailed in the Reports and Orders of March 1 and June 24, 1957. The

[1] The Court's recent decision respecting Peoria's allocations, WIRL Television Company v. United States, supra, has not decided the basic statutory questions of procedure involved in the Madison Docket 11754 proceeding, nor a number of the substantive matters raised by Radio Wisconsin therein. A Petition for Rehearing of the Court's WIRL decision is pending, as are several other appeals raising other related questions.

essence of the entire reallocations approach was the exercise of the Commission's discretionary judgment on the record surrounding a particular frequency (e.g. Madison Channel 3) within the framework of certain specified criteria as to whether or not the proposal would accomplish the stated objective of improving competitive opportunities there,and so serve the public interest. Upon such consideration, the Commission rightfully concluded that the established Madison Channel 3 allocation should be reaffirmed and not reallocated in the novel and drastic manner proposed. Substantial factual support existing in the record for the decision, it should be affirmed. (Id).

B. The Absence Of Any Valid And Effective Challenge To The Commission's Findings And Conclusions Alone Compels Their Affirmation

Apart from the substantial record support for the Commission's decisions, they may be affirmed alone on Winnebago's complete failure to challenge directly the Commission's supporting findings and conclusions on the basis of the factual record of the Madison-Rockford Docket 11754 proceeding now before this Court for review. Petitioner's Brief, as already shown, follows the fallacious technique of obliquely attacking such findings and conclusions respecting Madison Channel 3 only through argumentative assertions of inconsistency with some other selected Commission decisions respecting other channels throughout the country which had been considered in other separate proceedings on other rec ords. (See Sec. II - 5, above). This technique requires that the Court go outside the record of this appeal and the Commission's Madison proceeding, which would alone appear enough to condemn it. Brown v. Norfolk and Western Railway Co., 20 F. 2d 133 (4th C. C. A., 1927). Even, however, if it arguendo be assumed that the Commission's specific findings, conclusions and decisional criteria or the records in other separate proceedings are relevant here, Winnebago's approach is still defective.

Petitioner goes far beyond argument on the basis of designated findings, conclusions, decisional criteria, or even facts of record in other proceedings. Its tack is merely to assert argumentatively, without reference to any decisional matter or supporting record facts, that

the overall quantum and weight of the evidence respecting the several criteria in the Docket 11754 proceeding is equivalent to that in some other selected proceedings, so that identical results in all are allegedly required. To do so petitioner selectively wrenches the respective conclusions in each such proceeding out of their factual and overall decisional contexts; other more important facts are conveniently ignored or at most arbitrarily picked over so as to emphasize minor aspects at the expense of the comprehensive records in each. An appeal so based is improperly grounded.

Denial Of The Proposed Reallocation of Channel 3 From Madison To Rockford Was A Reasonable, And Even Necessary, Conclusion From The Commission's Findings On the Record Of The Docket 11754 Proceeding

With respect to denial of the proposed reallocation of Madison Channel 3 to Rockford -- which as has been shown is the only question for review properly before this Court[1] -- the Commission's decisional judgment that reallocation would not serve the public interest flowed ineluctably from the following factual findings upon the record of the Docket 11754 proceeding:

(1) Substantial "White Areas" Without Any Recognized Television Service, and Large "Grey Areas" With Only One Such Service, Would be created By Deletion of Madison Channel 3.

The Commission found, upon a close examination of all of the vast and disputed technical data of record in Docket 11754, that there would be a heavy loss of existing Madison area service if present WISC-TV Channel 3 service were deleted. This finding is amply supported on that record. (22 FCC 356, Pars. 7-10; R. 155-160, 186-215, 550-4, 574-585, 733-761). On these same record facts it concluded that the data submitted by Radio Wisconsin's engineers (showing such "white" and "grey" areas) was generally accurate and reliable, as well as conforming to the best available data and clearly closer to the true facts of service. (This was so even though "service" as such was admittedly

[1] The correctness of the Commission's denial of any and all possible reallocations of Madison Channel 3 will, however, be shown hereinafter.

difficult of exact evaluation). It concluded too that conflicting data submitted by proponents of deintermixture, including Winnebago, were unreliable and inaccurate, in part due to a faulty method of equipment calibration which involved "numerous opportunities for misleading results", and also as being out of line with the Commission's experience, with its estimated contours, and with other data before it relating to the rougher type of terrain found north and west of Madison. (Id.) [1]

The Commission thus effectively found that "white areas" in the order of 102, 000 persons in 3164 square miles were receiving their only recognized TV service from Madison Channel 3, and that from 60, 000 up to as high as 75, 000 or more of these persons would totally lose all such service upon any shift of Channel 3 to Rockford. (Par. 10) In the same way, in the order of an additional 51, 000 to 62, 000 persons of those 87, 000 or so in "grey areas" now receiving only their second (and alternative) service from Madison Channel 3, would lose it upon such reallocation. (23 FCC 53, Par. 11; R. 157-161). It properly concluded also that the 4, 000 or fewer people who would gain a first service by reallocation to Rockford failed to compensate for the much heavier loss of vital service upon such reallocation.

Winnebago nowhere disputes the Commission's factual findings on this engineering data in the Madison proceeding. It offers no valid basis to overturn the eminently proper technical conclusions respecting this first and important decisional criterion. [2] Clearly ineffectual here are its allegations of inconsistency based on unrelated findings in other pro-

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[1] All of such conflicting data were suspect, even involving practical impossibilities, in purporting to show "in many instances that the measured fields are greater than free-space fields as far as 20 miles from the UHF transmitter." (Id.)

[2] While the Commission indicated that the alleged intention of the Madison UHF stations to replace "white area" service was not an immaterial consideration, it properly concluded that it must yield here to more decisive factors. (22 FCC 356, Par. 11). It is moreover significant (wholly apart from whether such intentions were bona fide or were economically or otherwise feasible, all of which were contradicted on the record), that the same Radio Wisconsin field measurements credited by the Commission show UHF service in the "white areas" to be so poor that any higher UHF heights and powers, etc. would fall far short of replacing deleted VHF service. (R. 550-4, 574-585; Id., Par. 11, Fn. 3). Finally, in view of the deterioration of the Madison competitive situation which the Commission reasonably foresees from any reallocation of Channel 3 to Rockford, it would alone be most doubtful whether Madison UHF's would then be able or willing to achieve any costly increases in height and power for such limited purpose.

ceedings involving other cities, other terrain and different measurements on varying techniques.

(2) The terrain to the north and west of Madison is rough and broken and not favorable to UHF propagation.[1]

The Commission's finding of rougher Madison terrain is eminently sound, particularly so since it rests upon the full record of measurements submitted, all of which alike without dispute show the greater attenuation of UHF signals in these directions and areas. (Par. 7). It found that this was no more than "normally expected" as a generally recognized function of UHF where such rougher terrain brings shadowing effects causing "pockets" of no-UHF service. Significantly, this rougher terrain in the Madison area is found precisely among the "white areas," which would thus be aggravated by any reallocation.

Here again the Commission's findings stand unchallenged in the Docket 11754 record. Here again Winnebago avoids directly questioning the record facts supporting the findings, relying instead on argumentative and conclusionary comparisons of terrain in different areas which are wrenched out of decisional and factual contexts and so fallacious.

* * * * *

The other findings basing the Commission's decision are likewise abundantly supported in the factual record of the Docket 11754 proceeding. These too are not directly challenged by Winnebago. Summarized for purposes of brevity they are:

(3) The population in these "white areas" is relatively scattered, without communities capable of supporting their own TV stations (Id., Par. 7).

(4) The Madison area cannot effectively be "deintermixed" by reallocation, since:

(a) Outside VHF stations provide recognized service to Madison's threshold and serve most of the Madison UHF's coverage area. (Id., Par. 7).

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[1] Id., Pars. 7, 9. Winnebago grossly errs in repeatedly asserting (Brief, pp. 23, 27) that the Commission found such rougher terrain only to the north, since the decision clearly states otherwise.

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(b) Channel 3 at Rockford would necessarily provide primary VHF service to Madison and almost all of the Madison UHF's coverage area. (Id., Pars. 13-14).[1]

(5) Madison, larger and with greater state and regional significance, has greater need for Channel 3, its first VHF, than does Rockford for its second VHF, under Section 307(b) of the Communications Act. (Id., Par. 14).

(6) Reallocation would not improve and more likely worsen the competitive situation in Madison by bringing at least one powerful outside VHF service, straddling two markets, into that city and area. (Id., Par. 15).

(7) Reallocation would not effectively improve Rockford's competitive situation by creating a different but still significant disparity between the coverage of Rockford's two stations that could be eliminated only at the cost of further worsening the Madison competitive situation. (Id., Par. 15).

* * *

The Commission's ultimate decision was of course its balanced judgment compositely based upon all factors of record that reallocation would be against the public interest (Id., Par. 17). That there were recognizedly some facts of record and some less significant criteria looking the other way is, however, no basis for disturbing a sound and most reasonable administrative judgment that is supported by a preponderance of the evidence and findings.

C. Other Possible Reallocations Of Madison Channel 3 Are Not Appropriately Before This Court For Review and, In All Events, Were Properly Not Ordered By The Commission As Not In The Public Interest

Winnebago's sole proposal and litigated position before the Commission was, as already shown, proposed reallocation of Channel 3 to Rockford for its own use. Accordingly, it has not been aggrieved nor

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[1] The Commission properly found no merit to Winnebago's proposal that any Rockford Channel 3 station be directionalized away from Madison, on the express (and sufficient) ground that it would not cure and even aggravate the "white areas" created by reallocation (22 FCC 356, Par. 16; 23 FCC 53, Par. 10, FN 1). Significantly, Winnebago set forth this proposal on the record only as a passing aside in a short footnote. (R. 397) without any supporting engineering data whatever showing its feasibility within the Commission's strict limitations on the use of TV directionals. (Rules 3.685 (e)(f)). Such proposal would also likely violate such Rules against use of directionals for allocations purposes.

adversely affected by any other Commission reallocations decision respecting Madison Channel 3. Its appeal on these scores, alleging error in Commission failure to take other now urged reallocations actions, is therefore jurisdictionally defective and this Court should alone on this basis and in these respects dismiss and deny the Petition for Review. (Section 4 of the Judicial Review Act of 1950, supra; Section 10 of the Administrative Procedure Act, supra).

1. Possible Reservation of Channel 3 for Non-Commercial Educational Purposes

This basic jurisdictional defect is true with respect to possible educational reservation of Channel 3 at Madison, which reallocation Winnebago consistently fought against before the Commission. Assuming arguendo, however, that the Court is here disposed to consider the matter, it is clear that the Commission's denial of reservation is abundantly supported by, and actually compelled by, the facts of record in Docket 11754 which Winnebago does not challenge or dispute. On those facts, the Commission properly concluded that such reservation would: (a) undoubtedly mean the non-use of Channel 3 due to educational inability to obtain the necessary funds for conversion to and operation on it; and (b) likely destroy educational-TV in Madison altogether if educational conversion to Channel 3 were compelled in such circumstances. (22 FCC, 356-8) No basis whatever exists for the overruling of such required conclusions; none is offered.

2. Possible Non-Use of Channel 3

Winnebago's allegation of Commission error in not deleting and making no further use whatever of Channel 3 (i.e., placing it "on ice"), suffers from even greater jurisdictional defects. It too is not properly before the Court for review. This issue was never at any time raised before the Commission so as to provide the agency with an opportunity to pass upon it as statutorily required by Section 405 of the Communications Act. O'Neill Broadcasting Co. v. F.C.C., supra; Democrat Printing Co. v. F.C.C., supra. Furthermore, Winnebago's failure to cite such alleged error in its Petition for Review additionally precludes judicial consideration of it herein since the Court's jurisdiction is deter-

mined on the basis of the assigned reasons for appeal which serve the purpose of an assignment of errors. (Section 4 of the Judicial Review Act of 1950, infra; Stuart v. Federal Communications Commission, 70 U.S. App. D.C. 265, 105 F.2d 788 (1939); WOKO, Inc., v. Federal Communications Commission, 71 U.S. App. D.C. 228, 109 F.2d 665 (1939)). These decisions, although specifically relating to a requirement of Section 402(c) of the Communications Act, are fully applicable to a like provision covering appeals under Section 402(a) of that Act.

While this issue should accordingly be beyond the reach of judicial review, it should be noted in passing that the action now urged by Winnebago would mean arbitrary non-use of an available, vital and otherwise permissible frequency despite the consequent creation of vast "white areas" without any recognized TV service whatever. This would grossly violate the statutory mandate expressed in Sections 1 and 307(b) of the Communications Act requiring extension, "so far as possible", of television service. It would also contravene the Commission's enunciated criteria for possible reallocations. Certainly nothing advanced by Winnebago would in any way legally justify such unprecedented and extreme action, [1] which was not proposed by the Commission in Docket 11754 nor supported by any party therein. As shown, however, this issue need not and should not be decided herein by the Court.

D. The Commission's Decision Is Otherwise Valid And Proper; Winnebago's Other Allegations Of Error are Without Merit And Provide No Valid Or Effective Basis For Reversal

1. The Commission's Decision Is Not Only Supported By The Record In Docket 11754 But Also (assuming arguendo the relevance of any such comparisons) Fully Supportable In Relation to and Not Inconsistent With Other Commission Reallocations Decisions

It has already been demonstrated that the Commission's Madison

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[1] Despite Winnebago's contentions, the Commission's Elmira reallocations decision (assuming arguendo its relevance here) provides no precedent or inconsistency on this point to the Madison decision. In Elmira the Commission clearly found that Channel 9 could and would be allocated elsewhere, but merely preferred to leave the final reallocations choice to another proceeding (22 FCC 307, 313, 315, Pars. 18, 20). Since the Vail Mills decision also cited by Winnebago has been reversed by the Commission, it can per se stand for nothing on this or any score.

Channel 3 determinations rest upon and are fully supported by the factual record of the Docket 11754 proceeding, are not in any way arbitrary or capricious, and that Winnebago's defective and improper technique of indirectly challenging by conclusionary comparisons should be rejected. On these bases alone, petitioner's superficial charges of inconsistency between the Madison and some other decisions are clearly unfounded.

The Commission's reallocations decisions in Madison, as well as elsewhere, flow from its evaluated balance of a vast complex of factors and cannot be a mechanistic response to a few bare, superficial similarities. Even were it assumed arguendo (which is certainly not the case), that the instant Madison Channel 3 decision were not on all fours in major respects with another decision involving another frequency at a distant city, the Madison decision, valid and proper per se on its own record, would not on such basis then become erroneous. More significantly, there are no such basic inconsistencies between the several decisions as alleged.

The Madison Channel 3 decision reflects, as do the others, the same application of general criteria to the particular facts respectively presented. The pertinent allocations facts and circumstances concerning Madison Channel 3 are, however, to a substantial degree unique and different, both severally and in the aggregate, from those found in any other situation considered. Accordingly, as the Commission concluded in properly rejecting the charge of inconsistency, that the ultimate result in Docket 11754 is admittedly different from that in some of the other cities does not make it in any way inconsistent under the proper meaning of that term. (23 FCC 53-4; Par. 7).

Further refutation of the charge of inconsistency may be found in a comparison of some significant criteria in the several decisions on the basis of the available Commission findings or undisputed facts in them. Intended to be demonstrative rather than exhaustive (and again assuming arguendo the relevance of any such technique or other hearing records), such comparisons show:

(a) White areas: In contrast to the vast Madison "white areas"

shown by reliable engineering data (Par. B1, supra), the Springfield proceeding involved no existing "white areas" and only a comparatively small (12, 000 persons) potential "white area" (p. 322,[1] Par. 12); in Fresno there was no engineering demonstration of "white areas" to controvert UHF claims of service (p. 370, Par. 16).

(b) Offsetting Gains of "White Area" Service Upon Reallocation: In Madison, it was undisputed that reallocation could bring at most only a de minimis gain of 4, 000 people, not even beginning to balance the heavy loss of service (supra); in Evansville, however, reallocation elsewhere provided a substantial "white area" gain of from 56, 000 to 73, 000 persons to offset any such losses (p. 387, Par. 16); and in Springfield small gains would approximately counter-balance minor losses (p. 323, Par. 14).

(c) Terrain: While the Commission concluded that the terrain west and north of Madison was rough and broken and unsuitable for UHF (Par. B2, supra), it found flat terrain satisfactory or better for UHF in Springfield (p. 321, Par. 10), in Evansville (p. 385, Par. 11), in Peoria (p. 346, Par. 13) and in Fresno (p. 368, Par. 11).

(d) Effective Reallocations Use of Channel Elsewhere: While Madison offered no effective reallocations use of Channel 3 (B4, 7 above), the Springfield VHF Channel could effectively be used at both St. Louis and Terre Haute (p. 328, Par. 28); the Evansville VHF could effectively be used at Louisville (p. 389, Par. 21); the Fresno VHF could effectively be used at both Santa Barbara and at another northern community to be selected later (pp. 374-5, Pars, 31, 34).

(e) Outside VHF Penetration: While the Madison market already had substantial VHF penetration from multiple outside VHF stations as close as 55 miles away, at Rockford (p. 359, Par. 7), Fresno, Springfield and Evansville respectively had much lesser VHF penetration, with the closest VHF station being from 75 to 100 miles away from each. (p. 368, Par. 9; p. 384, Par. 9; p. 321, Par. 8).

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[1] All references here are to 22 FCC, pp. 293 et seq.

2. Petitioner's Amorphous Contentions That Its Procedural Rights Have Been Violated Are, With One Minor Exception, Not Properly Before This Court For Review And All Such Contentions Otherwise Wholly Without Merit

Winnebago allegations of procedural error below are raised in its Brief for the first time. Never having been asserted before the Commission to give that agency the required opportunity to pass on them, they are -- with the sole and minor exception of the Commission's denial of Winnebago's Petition for Leave to File Additional Comments (treated separately below) -- therefore jurisdictionally defective and not properly before the Court for review. Section 405 of the Communications Act, infra; O'Neill Broadcasting Company v. F.C.C., supra; Democrat Printing Company v. F.C.C., supra.

While the Court therefore will likely not review these issues, it may also be noted that petitioner has clearly received all of (and actually more than) the procedural rights to which it is entitled pursuant to law as the proponent of a change in the rule providing for a channel allocation in which it has no right or interest. It has no proper cause for complaint. (Sections 4, 6(d) of the Administrative Procedure Act, infra.) In fact the Commission's procedures on occasion (as with its detailed decisions) went beyond statutory requirements for rule-making to approach the level of procedures required for adjudicatory hearings on applications. Johnston Broadcasting Co. v. F.C.C., supra.[1] Winnebago's entire abstract presentation of generalized legal principles essentially complains only of the form of the Commission's final orders without citing a single specific and factual instance as to how it was adversely affected thereby. The short answer is that none exists.[2] But, in all

[1] In contrast, Radio Wisconsin as the permittee of the operating station whose authorization would have been modified by the proposed reallocation, had statutory rights under Sections 303 (f) and 316 of the Communications Act to a full adjudicatory-evidentiary hearing. It continually sought one before the Commission. The decisions relied on by Winnebago (Brief, pp. 38-9) are here applicable, if at all, to parties such as Radio Wisconsin whose rights were being directly invaded rather than to mere proponents of rule making changes such as Winnebago.

[2] That petitioner believed the rule making procedures to have been adequate until time for writing its Brief is demonstrated by its admonitions to the Commission below that "Rule making proceedings such as this [Docket 11754] are not adversary proceedings which may turn on [illegible] procedure..." (R. 809), or

(continued on next page)

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events, this issue has been shown to be beyond the scope of judicial review here.

* * * *

While Winnebago's allegation that the Commission improperly denied its untimely Petition for Leave to File Additional Comments in Docket 11754 is before this Court for review, it is patently unmeritorious and should summarily be rejected. That Petition was addressed to the Commission's procedural discretion, an area in which the agency necessarily has wide administrative latitude to control its own proceedings. Pulitzer Publishing Co. v. F.C.C., 68 U.S.App. D.C. 124, 94 F.2d 249, 252; F.C.C. v. WJR, The Goodwill Station, Inc., supra; Shein et al v. United States, supra. There being no showing whatever of the arbitrary and capricious, the administrative procedural determination should be affirmed. (Ibid).

The Docket 11754 proceeding, following years of reallocations uncertainty, was itself begun in June of 1956 and final comments filed on December 28, 1956. It was not until February 25, 1957, when the Commission publicly stood on the threshhold of (an adverse) decision, that Winnebago seemingly for purposes of delay and confusion threw in its untimely, wholly new and complex request for another complete phase of proceedings. Significantly, such request (involving requiring a Champaign operating station, by separate proceedings, to move its entire transmitting apparatus 20 miles southward so that Winnebago might modify and amplify its position in Docket 11754), was one that petitioner could have proposed earlier in a timely comment and for which it failed to give any justification for not doing so.

The Commission's action denying the petition was therefore a thoroughly reasonable, if not a necessary, exercise of its procedural discretion. For the Court to substitute its judgment for that of Commission here to overrule such determination would be stretching the bounds of proper judicial review past the breaking point.

(footnote continued from preceding page) that it was "...a rule making proceeding in which the Commission is not limited solely to the specific record herein made..." (R. 391).

CONCLUSION

For the foregoing reasons the decisions and Reports and Orders of the Federal Communications Commission here under review should be affirmed.

Respectfully submitted,

ARTHUR SCHARFELD
ARTHUR STAMBLER

Counsel for Intervenor
Radio Wisconsin, Inc.

SCHARFELD & BARON
National Press Building
Washington 4, D. C.

May 15, 1958

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REPLY BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of
FILED JUN - 3 1958
Joseph W. [illegible]
CLERK

No. 14,086

WINNEBAGO TELEVISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

RADIO WISCONSIN, INC.
and
GREATER ROCKFORD TELEVISION, INC.,

Intervenors.

PETITION FOR REVIEW OF ORDERS OF THE

FEDERAL COMMUNICATIONS COMMISSION

JAMES A. McKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson
1735 DeSales Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

June 3, 1958

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 14,086

WINNEBAGO TELEVISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

RADIO WISCONSIN, INC.,
and
GREATER ROCKFORD TELEVISION, INC.,

Intervenors.

PETITION FOR REVIEW OF ORDERS OF THE

FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER

The arguments which counsel for the Commission and the intervenors have advanced in their answering briefs were anticipated in large part in our opening brief and there dealt with. Accordingly, it is not our intention to cover that same ground again. A few matters, more particularly this Court's recent decisions affirming action by the Commission in Peoria and Springfield -- action which we contend should have been taken in Madison -- merit a few additional comments.

A. THIS COURT HAS JURISDICTION TO REVERSE THE ACTION HERE COMPLAINED OF

Reduced to its essence, opposing counsel contend, in effect, that action by an administrative agency, no matter what reasons it may advance therefor and regardless of its impact on an existing licensee, should not be disturbed by the courts. Administrative agencies, it is true, possess broad but not unfettered discretion. They must function within the framework of the statutes under which they were created and in furtherance of the objectives there laid down by the Congress.

In creating the Federal Communications Commission, Congress has formulated certain guiding principles -- requiring the Commission to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)), and "to provide a fair, efficient and equitable distribution of radio service" among the several States and communities (47 U.S.C. Sec. 307(b)). Whether the basic policies thus set forth in a governing statute are or are not being effectuated by an administrative agency is a proper matter for judicial scrutiny. Unless the Commission states the reasons for its action with sufficient precision and logic to enable the Court to determine whether the challenged action is or is not in furtherance of expressed Congressional policy, the matter must be remanded to the agency for further proceedings. Schaffer Transportation Co. v. United States, 2 L.Ed. 2d. (adv. op.) 117 (1957). In taking such action the courts are not substituting their judgment for that of the administrative agency.

B. THE ACTIONS COMPLAINED OF WERE ARBITRARY, UNSOUND, AND A DENIAL OF DUE PROCESS

Despite palliative arguments by Commission counsel, and "hands-off" contentions by Radio Wisconsin, Inc., certain facts still stand out. Channel 3 was allocated to Madison and Channel 13 to Rockford, in the Sixth Report of April 14, 1952, on the then justified (but now admittedly erroneous) assumption that the intermixture of UHF and VHF channels

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in the same areas would result in due course in a "single, nationwide television service" (1 RR Pt. III, p. 91, para. 197; Radio Wisconsin, 8 RR 823). Actual events proved otherwise. In a Report and Order issued following a general rule-making proceeding in Docket No. 11532 (June 26, 1956), the Commission finally concluded: (1) that its original intermixture policy was a "mistake;"[1] (2) that UHF could not survive even in populous areas receiving a Grade A service from two or more VHF stations;[2] (3) that the 12 VHF channels alone are insufficient to provide an adequate television structure (coverage and local outlets);[3] and (4) that the mistaken intermixture policy should be corrected in two ways -- by a possible long-range shift of all television to UHF (thus eliminating intermixture), and by the deletion (as an interim measure) of VHF channels in areas where such action would "improve the opportunities for effective competition among a greater number of stations" (13 RR 1571).[4] To that end the Commission (concurrently with its Report in Docket No. 11532) instituted a proceeding looking toward the deletion of Channel 3 in Madison (Docket No. 11754). At petitioner's request the proceeding was broadened to include the deintermixture of

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1 Jacksonville Journal Co. v. Federal Communications Commission, 101 U.S. App. D.C. 12, 246 F.2d 699, 700, 15 RR 2045 (1957). Yet, Radio Wisconsin, Inc. (Br. p. 3; cf. Br. p. 5) would have this Court believe that "Despite the recent agitation concerning the matter of intermixture of VHF and UHF television channels, that allocation principle still remains a keystone of the nationwide Table."

2 "Our experience in other markets convinces us [that] the advent of a second VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of existing UHF stations to continue to provide service in the area." 22 FCC Reports 293, 302 (para. 19). Cf. Commission's brief in WIRL Television Company v. United States (Case Nos. 13, 768 et al., p. 26, where Commission counsel exploded Radio Wisconsin's "three-year head-start" argument (Br. p. 3): "It seems clear that despite the head start of the [two] UHF stations in Peoria operation there by one VHF station proposed in 1952 is likely to seriously jeopardize the continued successful operations of one or both of the existing UHF stations as well as any real possibility of the successful development of a fourth station." See also Channel Assignment to Columbia, S. C., 15 RR 1682, 1688 (1957).

3 "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone are not adequate to make possible sufficient outlets for a fully competitive television system." Report and Order, released June 26, 1956, in Docket No. 11532 (13 RR 1571, para. 12).

4 See WIRL Television Company v. United States, Case No. 13, 768, slip opinion of March 27, 1958, pp. 3-6 (U. S. App. D.C.).

both Madison and Rockford -- by making Madison all-UHF and Rockford all-VHF, or alternatively by making both markets all-UHF (R. 69-77, 388).

The June 26, 1956 Report and Order, vigorously endorsed by the Senate Committee on Interstate and Foreign Commerce in its interim study released July 23, 1956 (R. 520-526), represents a complete shift by the Commission in its basic allocation philosophy -- a fact we cannot emphasize too strongly and one which Radio Wisconsin would like to ignore (Br. pp. 3, 9, 16, 18).[1] In fact, notwithstanding this Court's action twice sustaining the Commission's authority to deintermix individual markets to all-UHF "in order to improve the opportunities for effective competition among a greater number of stations,"[2] Radio Wisconsin (Br. pp. 7, 13, 17-18) continues to challenge the legality of the June 26, 1956 Report and Order -- where at least five Commissioners (McConnaughey, Hyde, Bartley, Lee and Webster) concluded that the deletion of a single VHF channel in predominantly UHF areas could result in more rather than less television service (13 RR 1571).[3] Radio Wisconsin, Inc. (Br. pp. 7, 14, 17, 23, 25) continues to argue, notwithstanding this Court's square holding to the contrary in Sangamon Valley, that the deletion of a community's one and only VHF station would contravene Section 307(b) of the Act.

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1 The fact that the Commission, at various times when intermixture was still "basic" to the Sixth Report, had refused to remove Channel 3 from Madison was certainly no reason for refusing to take that action after June 26, 1956. Cf. Radio Wisconsin's Br., pp. 6 fn. 1, 16.

2 WIRL Television Company v. United States, Case Nos. 13,768, 13,769, and 13,912, decided March 27, 1958; Sangamon Valley Television Corporation v. United States, Case No. 13,992, decided May 1, 1958.

3 Commissioner Doerfer dissented from that portion of the June 26 Report proposing to delete VHF channels as an interim measure (13 RR 1571, 1594). In his separate statement Commissioner Mack likewise seemingly endorsed only the long-range portion of the June 26 Report (13 RR 1571, 1593) -- a conclusion further substantiated by the fact that he (like Commissioner Doerfer) dissented from each of the six cases decided March 1, 1957 where a majority of the Commission voted to make a given market all-UHF (Springfield, Peoria, Evansville, Fresno, Elmira, and Albany-Schenectady-Troy).

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As pointed out in our opening brief (pp. 22-23), a 4-3 majority of the Commission (McConnaughey, Doerfer, Mack, and Craven), in comparing the relative needs of Madison and Rockford in the actions here under review and despite the June 26, 1956 shift in allocation philosophy, looked at the Section 307(b) problem in the same fashion as it had in 1952 -- as though UHF and VHF could render "radio service" side by side in the same communities, and then deciding which community was more in need of a "wide-coverage" VHF channel, without considering its impact on other UHF services in the area. The consequences of such intermixture, fully recognized in the June 26, 1956 Report in Docket No. 11532, were ignored in the Reports and Orders of March 1 and June 24, 1957 here under review. This is not surprising when it is remembered that two Commissioners who comprised that majority of four (Commissioners Doerfer and Mack) had voted against any interim policy of deintermixing individual markets on a case-to-case basis and against all proposals to deintermix a given market to all-UHF. And both from his dissent in Docket No. 11532 (13 RR 1571, 1594) and his dissent in the Fresno case (22 FCC Reports 376, 378-379), which he made applicable to the other areas where deintermixture to UHF was ordered (22 FCC Reports 376, fn 15), it is clear that Commissioner Doerfer's vote (whatever may be said of Commissioner Mack's)[1] was predicated on his belief (since held to have been erroneous by this Court) that Section 307(b) of the Act precluded the Commission from restricting one market to all-VHF and another market to all-UHF. Sangamon Valley Television Corporation v. United States, Case No. 13,992, decided May 1, 1958.

Pitted against this mottled majority vote, two members of which had disagreed with interim deintermixture of any kind (as evidenced by their statements in Docket No. 11532) and one of whom erroneously believed that the removal of Channel 3 from Madison would be illegal, were the three Commissioners (Hyde, Bartley, and Lee) who helped make up the majority in the Peoria and Springfield cases which were

1 See footnote 3, page 4, supra.

deintermixed to all-UHF and which this Court has since sustained. That the result reached in Madison is diametrically opposite to that reached in six other proceedings decided the same day (Peoria, Springfield, Elmira, Fresno, Evansville, Albany-Schenectady-Troy) is made clear by Commissioners Hyde, Bartley, and Lee (R. 799-802). Counsel for the Commission (Br. p. 27) and for Radio Wisconsin (Br. p. 26) are perforce compelled to recognize that the end result was different, but they argue that the facts were different.

In our opening brief we made it clear that the controlling facts are not different, and that if the same rationale (which this Court affirmed in Peoria and Sangamon) were used in Madison and Rockford, those markets would likewise have been deintermixed (Petitioner's Br. pp. 17-36).[1]

Radio Wisconsin, in a desperate effort to sustain a result not predicated on the record, and attributable in part to a disagreement by two Commissioners (Doerfer and Mack) with the basic change in allocation philosophy enunciated by a 5-2 majority of the Commission on June 26, 1956, and on a mistaken interpretation of Section 307(b) by Commissioner Doerfer, argues that reference cannot be made to other proceedings decided the same day -- even though they were all part of the 13 simultaneously instituted by the Commission as a result of its June 26, 1956 action, even though they were all decided the same day (March 1, 1957) and even though they were all designed to rectify an admittedly erroneous allocation philosophy utilized in 1952. Certainly this Court has jurisdiction to correct "arbitrary and erroneous" action

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1 Commission counsel would leave the erroneous impression that the Commission in the Madison case found "rough areas" in two directions -- "to the north and southwest (Br. p. 9; cf. Br. p. 18). The Commission found rough terrain in one direction only -- "to the north and west," while admitting that "the terrain to the east and southeast is relatively smooth and favorable for the propagation of UHF signals" (R. 795, para. 7). The Court should bear in mind that in Elmira, despite the following findings on terrain, the Commission deintermixed Elmira to all-UHF (22 FCC Reports 310, para. 10): "The record indicates that the terrain in the Elmira area is generally rough and irregular, the elevation of area within 10 miles of [illegible] varying between 800 feet and 1900 feet . . . with narrow valleys and sharp mountain peaks."

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of an administrative agency. Despite Radio Wisconsin's views to the contrary (Br. pp. 14, 19), we know of no better way of showing an arbitrary and an unreasoned result than to contrast the action complained of in one proceeding with that taken on the same date in related (if not to all intents and purposes identical) situations.

In affirming the Commission's action in Peoria and Springfield (where Hyde, Bartley, and Lee, in line with 5-2 action of the Commission enunciated in Docket No. 11532, decided to deintermix to all-UHF those areas which were predominantly UHF and to all-VHF areas those which were predominantly VHF), this Court did so by making reference to the long-range proposal of ultimately shifting television to the UHF band and by concluding that deintermixture of those markets to UHF, in line with the interim goal of improving "the opportunities for effective competition among a greater number of stations" was amply supported by the record. WIRL Television Company v. United States, supra, slip op. p. 7. To intimate, as do the Commission (Br. p. 16) and Radio Wisconsin (Br. pp. 12, 17, 18), that those carefully limited decisions call for an affirmance of a diametrically opposite result, reached by a different majority of the Commission (two of whose members disagreed with the "interim" philosophy which the Court there approved) and two of whom are no longer members of that agency (McConnaughey and Mack) is to ask this Court to abdicate its ascribed functions. Petitioner, as an existing licensee vitally affected by the ultimate channels which were to be utilized in the Rockford-Madison area,[1] was entitled to a decision predicated on the new allocation concepts enunciated as a result of the general rule-making proceeding in Docket No. 11532 -- pursuant to which a majority of the Commission instituted the proceeding to

---

1 Radio Wisconsin, Inc. has the audacity to suggest (Br. pp. 23-24) that if Channel 3 was not shifted to Rockford, petitioner has no concern with its utilization or nonutilization elsewhere. Since Channel 3, so long as it is assigned to Madison, is in a position to place a Grade A signal into Rockford (and even places a Grade B signal there at present), petitioner as a UHF operator in Rockford has a vital interest in its utilization or nonutilization in Madison -- whether it be shifted to Rockford or not.

deintermix Madison to all-UHF, and not to a decision predicated on an erroneous construction of Section 307(b) held by a key member of that 4-3 majority (as this Court has since held).

Now that this Court has made it clear that Section 307(b) does not require each community to be allocated a proportionate share of VHF as well as UHF channels, a decision reached after the instant appeal was taken, and since it is clear that at least one of the key votes against deintermixture in Madison was predicated on an erroneous interpretation of Section 307(b), it is patent that this proceeding should be remanded to the Commission for decision in the light of correct legal principles. This is particularly true where, as shown in our opening brief (pp. 17-36), the "approach" and "reasoning" of the majority of the Commission in this case was so flagrantly inconsistent with that of a different majority of the Commission in Peoria, Springfield, and four other proceedings decided the very same day that it can only be characterized as arbitrary and erroneous.

Our adversaries contend that this Court's decisions sustaining the Commission's Sixth Report and the Commission's Orders of November 10, 1955 are dispositive of this appeal. We disagree. The Sixth Report was concededly a general rule-making proceeding, established television allocation standards and patterns for the entire United States. The appellants in the Logansport and Peoples cases were prospective applicants, as to whom the Sixth Report was "general and future" in its effect. See Logansport Broadcasting Corporation v. United States, 93 U.S. App. D.C. 342, 345, 210 F.2d 24, 27 (1954). They were not existing television licensees, in a position to object to a grant of a new station at the expense of an existing operation. See Great Western B. Ass'n. v. Federal Communications Commission, 68 U.S. App. D.C. 119, 123, 94 F.2d 244 (1938). As to the appellants in those cases, unlike petitioner here, the Sixth Report was merely "determinative of specific situations arising in the future." Logansport Broadcasting Corporation v. United States, 93 U.S. App. D.C. 342, 345, 210 F.2d 24, 27 (1954). Its impact was "general and

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future," not "particular and immediate." Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 81, 175 F.2d 808 (1948).

The first "round" of deintermixture appeals (Coastal Bend and related cases), as we had occasion to note in our opening brief (Br. pp. 6 fn. 2, 44 fn. 2), presented the narrow issue of the Commission's authority to continue to make new VHF grants and allocations (pursuant to provisions of the Sixth Report) while that Report was being reexamined by the Commission in Docket No. 11532.[1] The Commission had concluded that it should "adhere" to the Sixth Report until it decided upon something preferable. This Court (on June 7, 1956) sustained that determination in the Coastal Bend cases after ascertaining that there was "a reasonable and legal basis" for the action complained of. Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 255, 234 F.2d 686. But after those cases were decided by this Court, the Commission on June 26, 1956 concluded that the intermixture concept, which had been "basic" to the Sixth Report, was a "mistake" (Report and Order in Docket No. 11532, 13 RR 1571),[2] and that the intermixed 1952 allocations in certain markets (including Madison) should be reexamined to determine the impact of multiple VHF stations on UHF operations in such areas. Such was the purpose of the proceeding in Docket No. 11754.

It is petitioner's contention that the utilization of Channel 3 in Madison will destroy or jeopardize petitioner's operation in Rockford, not to mention other UHF operations in Madison, thereby resulting in less rather than more competitive services. The ultimate result

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1 The "drop-in" of Channel 10 in Vail Mills involved in the Van Curler case relied on by the Government (Br. p. 32) was in strict accordance with the intermixture concept and express provisions of the Sixth Report -- taken before the Commission repudiated that "basic" concept in its June 26, 1956 Report and Order in Docket No. 11532 (13 RR 1571).

2 See Jacksonville Journal Co. v. Federal Communications Commission, 101 App. D.C. 12, 246 F.2d 699, 700 (1957).

reached in the Madison-Rockford proceeding, we submit, was unreasoned and arbitrary, in contravention of Sections 303(g) and 307(b) of the Act, and hence reviewable by this Court on petition by an existing licensee.

Under no theory is the WIRL decision released March 27, 1958 contrary to the contentions here made. Undersigned counsel have supported the Commission's March 1, 1957 actions deintermixing Peoria, Springfield, Evansville, Fresno, Elmira, and Albany-Schenectady-Troy. In the expectation that the Peoria action would be affirmed, we cited in our opening brief a number of sentences from the Commission's brief in the WIRL case in support of our contentions here, showing that the Madison result was diametrically opposite to that reached in Peoria and contrary to the policies enunciated by the Commission in Docket No. 11532 (13 RR 1571). The Commission's action in Peoria, as we read the March 27 opinion of this Court, was affirmed on the basis of the fact that the removal of Channel 8 was in furtherance of principles laid down in the June 26, 1956 Report and Order in Docket No. 11532 (of ultimately moving all television to UHF and in the interim of shifting certain markets to all-UHF where such action was feasible), and that there was therefore an "adequate legal and factual basis" for the Commission's action deintermixing Peoria (Slip Op. p. 7). It is one of our express contentions in the instant appeal that the refusal to deintermix Madison and Rockford "contravenes the policy pronouncements in Docket No. 11532" (Issue 2). If (as we submit) it does, and (as shown in our opening brief, pp. 17-36) there is no "legal or factual basis" for the action complained of, the rationale of the WIRL case is no precedent for affirming the contrary action in Madison.

C. PETITIONER'S SEVERAL CONTENTIONS ARE PROPERLY BEFORE THIS COURT

In an effort to forestall a decision by this Court on the fundamental issues raised by petitioner, counsel for Radio Wisconsin in particular and Commission counsel to a lesser degree contend that certain points are not properly before this Court.

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Our lengthy discussion (Br. pp. 36-52) of what Justice Rutledge has termed the "essential minima" of due process even in rule-making proceedings[1] was not presented as an independent assignment of error. Intending to demonstrate that the instant decision was wholly unreasoned and arbitrary, that discussion was included in our opening brief to foreclose any spurious contention that the Commission, because the action was taken in a so-called rule-making proceeding, could reach any conclusion it saw fit.

Having thus erroneously treated our Points II and III (Br. pp. 36-52) as an independent assignment of error, rather than a refutation of anticipated contentions that the action complained of was taken in a so-called rule-making proceeding, the cases relied on by our adversaries (FCC Br. pp. 12, 26, 33; Radio Wisconsin Br. pp. 14, 15, 24, 28) are not in point. As soon as the Commission made its first arbitrary step (by releasing an unreasoned decision on March 1, 1957 in which it refused to consider rebuttal data, or to honor petitioner's requests for oral argument or to set forth a rational "basis" for the result reached), petitioner pointed out the "arbitrary" (non-due-process) character of the Commission's action and its standing as an existing licensee to demand a reasoned, rational conclusion -- to no avail (R. 816-830). In our opening brief we demonstrated, we believe, the arbitrary character of the Commission's refusal to deintermix Madison. To prevent the Commission from "wiggling off the hook" by resorting to what Justice Cardozo described as the "tyranny of labels," we explained why the arbitrary action thus taken could not be excused on the ground that it was made in a so-called rule-making proceeding. We thus do not have an Albertson or O'Neill situation or a Section 405 problem. See Gerico Investment Co. v. Federal Communications Commission, 99 U.S. App. D.C. 379, 380-381, 240 F.2d 410 (1957).

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1 National Broadcasting Company, Inc. v. Federal Communications Commission, 76 U.S. App. D.C. 238, 248, 132 F.2d 545 (1942), aff'd 319 U.S. 239 (1943); see also Philadelphia Co. v. Securities and Exchange Comn., 84 U.S. App. D.C. 73, 175 F.2d 808 (1948), dismissed as moot 337 U.S. 901 (1949); Morgan v. United States, 298 U.S. [illegible] (1936).

In our petition for review, after denial of our petition for rehearing in which we pointed out the arbitrary and irrational nature of the March 1 Report and Order, we included the following grounds, thereby fully preserving the matters here argued:

> 12. The Commission's actions are arbitrary, capricious, illegal, a denial of due process of law, not supported by the evidence of record, otherwise contrary to law, and in derogation of the public interest.
>
> 13. The Commission's failure to improve the opportunities for effective competition in the Madison-Rockford areas violates fundamental principles of the Communications Act of 1934, as amended, including specifically Sections 303(g) and 307(b) thereof.
>
> 14. The Commission's decisions in its various deintermixture proceedings are totally inconsistent with each other; factors found crucial and determinative in some are not even considered in others, thus resulting in arbitrary and capricious final determinations.
>
> 15. The ad hoc selection and weighing of factors in the several deintermixture proceedings, varying the applicability and weight of the factors on a case-by-case basis to support the Commission's inconsistent conclusions, constitutes arbitrary and capricious action by the Commission and a denial of due process of law.
>
> 16. The Commission's actions are inconsistent with public policy determinations reached in Docket No. 11532. . . .
>
> 21. The Commission illegally and arbitrarily refused to consider and weigh the relevant and material evidence of record; rather the Commission arbitrarily picked out those considerations and evidentiary material which on the surface appeared to support its [illegible]; it ignored contrary

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evidence -- thereby arbitrarily reaching a conclusion contrary to that which it reached on comparable evidence in other deintermixture proceedings (Peoria, Springfield, Albany, Fresno, and Evansville).

The statutes under which review was sought merely require a "concise statement of . . . the grounds on which relief is sought" (5 U.S.C. Sec. 1034). A petitioner is not required to "brief" his appeal in the petition for review.[1] To contend as do our adversaries that we cannot therefore argue in this Court that the actions thus challenged (no matter how labeled) were arbitrary and a denial of due process and in contravention of the Communications Act is unsound.

As an existing UHF licensee in Rockford, whose operation will be affected by a VHF operation in Madison which places a strong signal in Rockford, petitioner can rightly complain of the Commission's failure to consider various alternatives -- of deleting Channel 3 and placing it on ice as the Commission did in Elmira and in Albany-Schenectady-Troy; of assigning Channel 3 to Orangeville and requiring the grantee to directionalize its operation so as to keep any signal out of Madison; of requiring WCIA to shift its transmitter location (at petitioner's expense) so that Channel 3 could be utilized 70 miles south of Madison and still provide city-grade service to Rockford; of making both Madison and Rockford all-UHF, thereby establishing a UHF area starting with Madison to the north, extending southward to Peoria, and thence to Springfield. In the other proceedings decided March 1, 1957, where deintermixture was ordered, such matters were considered in arriving at the public interest. Petitioner had shown that Rockford was ringed and hemmed in by VHF signals to a much greater degree than Madison -- evidence which suggested that Channel 3 could be better used in Rockford than Madison, or that Channel 3 be reserved for educational use,

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1 In appeals to this Court under Rule 73, F.R.C.P., no grounds whatever need be assigned to the notice of appeal.

or alternatively that both Rockford and Madison be made all-UHF. In the decision here complained of, the Commission refused to consider these suggested alternatives (R. 69-77, 388).

CONCLUSION

For reasons stated in our opening brief and the instant reply brief, the actions of the Commission here challenged should be reversed, with instructions to the Commission (a) to consider rebuttal data submitted by petitioner on February 4 and 25, 1957; (b) to consider alternative uses delineated in the various proposals under reconsideration, and (c) to weigh the evidence, make findings of facts based on the evidence, and reach a conclusion supported by its basic findings.

Respectfully submitted,

By /s/ James A. McKenna, Jr.
James A. McKenna, Jr.

/s/ Vernon L. Wilkinson
Vernon L. Wilkinson

McKenna & Wilkinson
1735 DeSales Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

June 3, 1958

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BRIEF FOR INTERVENOR, GREATER ROCKFORD TELEVISION, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,086

United States Court of Appeals
For the
District of Columbia Circuit
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GREATER ROCKFORD TELEVISION, INC.,

Intervenors.

PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

MARCUS COHN
PAUL DOBIN
317 Cafritz Building
Washington 6, D. C.

Attorneys for Intervenor
GREATER ROCKFORD
TELEVISION, INC.

May 15, 1958

Washington, D. C. ROBERT I. THIEL Telephone EX 3-0625

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Intervenor, Greater Rockford Television, Inc., directs its brief to the sole question:

> Whether the Commission properly refused to delete Channel 13 from Rockford in the proceedings below.

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BRIEF FOR INTERVENOR, GREATER ROCKFORD TELEVISION, INC.

COUNTERSTATEMENT OF THE CASE

This proceeding arises as a result of a proposal made by the Commission in a Notice of Proposed Rulemaking (R. 1-2) in June 1956, looking toward the removal of VHF Channel 3 from commercial service at Madison, Wisconsin. In August 1956, Appellant submitted a counter-proposal that Channel 3 should be assigned to the Rockford area (R. 69-77) and on October 22, 1956, the Commission announced that this counter-proposal would be considered in the rulemaking proceedings below (R. 106-107).

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Greater Rockford Television, Inc. (hereinafter referred to as Greater Rockford) is the licensee of Television Station WREX-TV located in Rockford, Illinois and operating in the VHF on Channel 13. Greater Rockford has never opposed or taken any position on the possible removal of Channel 3 from Madison and its reassignment to the Rockford area. It takes no position here on the validity of the Commission's action refusing to grant Appellant's counterproposal that Channel 3 should be assigned to the Rockford area. Its interest in this case arises solely from the fact that Appellant, during the course of the proceedings below, introduced still another proposal, namely, that if Channel 3 is not assigned to the Rockford area, then Channel 13, Greater Rockford's Channel, should be deleted and WREX-TV should be compelled to operate in the UHF.

On December 3, 1956, Winnebago filed Comments below in support of its counterproposal to reassign Channel 3 to Rockford (R. 368-526); extensive data was submitted in support of this counterproposal. In addition, however, Winnebago suggested in these Comments what it termed an "alternative counterproposal" that Channel 13, now used by Station WREX-TV, be deleted from Rockford. This "alternative counterproposal" was referred to cryptically, and only in passing, on Pages 1 and 12 of the Comments filed by Winnebago (R. 388;399). No request for Show Cause Order directed to WREX-TV was made and no data of any kind was submitted to the Commission in support of this "alternative counterproposal" as was required by the Commission's original Notice of Rule Making and later Order of November 6, 1956, in this case (R. 1-2; 110-113). On the contrary, the engineering statement submitted in support of the Winnebago Comments stated expressly that it was directed solely to the shifting of Channel 3 from Madison to Rockford (R. 401). Appellant's intimation on Page 10 of its brief that it, in fact, submitted data bearing on the possible deletion of Channel 13 from Rockford is erroneous and misleading.

Because there was no data submitted during the proceedings in support of this "alternative counterproposal" to delete Channel 13 from Rockford, the Commission refused to pass on the merits of the proposal during this proceeding.[1] With respect to this matter it said: (R. 792)

> As an alternative Winnebago urged in comments filed herein that, if channel 3 is not assigned to Rockford, the Rockford area be deintermixed by deleting Channel 13. Since no other channel was proposed as a substitute for channel 13 and no comments supporting this proposal were received, it will not be considered in this proceeding.

SUMMARY OF ARGUMENT

The Commission properly refused to delete Channel 13 from Rockford in the proceedings below. While Appellant made such a proposal, it offered no data in support thereof. In fact, the very information it submitted demonstrated that adoption of the proposal was contrary to the public interest.

ARGUMENT

Despite the fact that Appellant submitted no data in support of its suggestion that Channel 13 should be deleted from Rockford, it now claims on this appeal that the Commission committed error in refusing to make Rockford all-UHF by deleting Channel 13 from Rockford (See Appellant's Brief, p. 13). At another point it claims that the Commission, in disposing of Appellant's other proposals and requests, ignored the

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[1] In this connection it is appropriate to point out that the proposal had been made to the Commission once before by Appellant and abandoned. During the pilot proceedings, referred to on Pages 5-6 of Appellant's brief, Appellant had suggested that Channel 13 be deleted from Rockford (See First Report on Deintermixture, 13 R.R. 1511, 1513). In those proceedings the Commission had requested Comments from interested persons concerning the effect upon the public interest of the possible deletion of Channel 13, and Greater Rockford on May 17, 1955, opposed the deletion of the channel and submitted extensive Comments and data on this question (Ibid.) Although it was Winnebago which had suggested the possible deletion of Channel 13 in connection with the institution of the formal rule making proceedings in Docket No. 11335, during the proceeding itself Winnebago abandoned this counterproposal and submitted no information or data on this question.

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proposal to make Rockford all-UHF by deleting Channel 13 (See Appellant's Brief, pp. 29, 31, 34, 46). In its conclusion, it requests this Court, upon a reversal, to require the Commission to consider alternative proposals submitted by Appellant in its comments, and apparently this request for relief, if granted, contemplates that the Court will require the Commission to consider the proposal to delete Channel 13.

In view of the fact that there was no data in the record bearing on this question, it is clear that the Commission could not properly have taken any action in this proceeding to adopt this proposal. In its Final Decision and Order in Docket No. 11532 (13 RR 1571), the Commission described the kind of information which it would require before it would take action to delete a VHF station in order to make an area all-UHF. This involved such information as to whether a significant number of people would lack service as a result of the elimination of the VHF channel, whether the terrain is reasonably favorable for UHF coverage, and whether, taking into account all the local circumstances, the elimination of a VHF channel would bring about more effective competition among a greater number of stations. See 13 R. R. at 1582. The requirement that such information be supplied in connection with any proposal to eliminate a VHF assignment was expressly incorporated into these proceedings (R. 1-2; 110-113). Indeed, appellant in its Comments recognized that these factors would govern the disposition of any such proposal (R. 393). Nevertheless, it submitted no data bearing on these matters in support of the proposal to delete Channel 13.

It can be readily understood why Appellant failed to submit any data in support of the proposal to delete Channel 13 from Rockford. The very Comments filed by Appellant in these proceedings in support of other proposals demonstrated that Rockford is in an area which cannot successfully be converted into an all-UHF area. Thus, Winnebago asserted in its Comments (R. 395) that Rockford is a "VHF-predominant area". The Comments pointed out that the Winnebago Grade B service

area receives Grade B service, in part, from four Chicago VHF stations, three Milwaukee VHF stations, one Rock Island VHF station and one Davenport VHF station (R. 395-396). There are as many as seven commercial VHF signals in the WTVO Grade B service area, not taking into account service from WREX-TV (Ibid.). The engineering statement filed in support of the Winnebago Comments categorically asserted "Rockford is a VHF area", and describes in detail the extent of VHF service in the area (R. 401). Indeed, because the Rockford area is so predominantly a VHF area, Winnebago made the following statement in its Comments (R. 396):

> "In view of the large number of VHF signals which come in from outside, it is clear that development of high UHF conversion outside of Rockford proper cannot be expected."

Appellant's very Comments themselves demonstrated that its alternative proposal to make Rockford all UHF by deleting Channel 13 was impracticable and completely contrary to the public interest. The Commission, therefore, properly failed to consider the merits of the proposal because no data was offered in its support. Moreover, on the basis of the record cited above, it is clear that the Commission committed no error in failing to take action to adopt this proposal on its own motion.[2]

There was, therefore, no error in the Commission's disposition, in the proceedings below, of the bare proposal to delete Channel 13 from Rockford. No matter what other action this Court may feel is appropriate, if the Commission's decision below should be reversed, it is clear that the further proceedings can only be on the basis of the record

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2 A show cause order and hearing would have to be afforded to WREX-TV before the proposal could be adopted.

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made in this proceeding and for this reason no further action with respect to the proposal to delete Channel 13 is warranted.

Respectfully submitted,

MARCUS COHN

PAUL DOBIN

317 Cafritz Building
Washington 6, D. C.

Attorneys for Greater
Rockford Television, Inc.

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